NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 006 - FOLDER 008 DC

Elena Kagan Law Review 9 [8]

FOIA Number: Kagan

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14686

FolderID:

Folder Title:
Elena Kagan Law Review 9 [8]

Stack:	Row:	Section:	Shelf:	Position:
V	13	2	11	1

n66 Hays, 969 F.2d at 117. To determine whether the campus serves as a public forum for students, the court must look to whether the university has a general policy and practice of allowing student speech on campus.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A. Public Forum Doctrine Governs Resources that Support Speech Within the Campus Forum

"The object of public forum doctrine," states Robert Post, "is the constitutional clarification and regulation of government authority over particular resources." n67 Space is a resource that, like any other resource student organizations need to engage in speech, can be reduced to financial terms. n68 Simply by maintaining a forum without charging any user fee, the government in effect subsidizes the speech that takes place within that forum. n69 A group that can use university facilities for speech in meetings and presentations to the larger campus community saves the significant cost of renting space. n70 Thus, even where the public forum at issue can easily be conceptualized as a space, what is in fact at issue is the government's ability to make content-based distinctions in subsidizing the use of that space. The creation and maintenance of a public forum can be seen as a subsidy of speech [*2023] that occurs on public property, such as public university campuses, that is traditionally or by designation dedicated to public debate. n71

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n67 Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1713, 1782 (1987).

n68 As Elena Kagan points out, "There are many ways for the government to pay for speech, and all content-based underinclusion cases -- regardless whether they involve the writing of a check from tax revenues -- involve some mechanism by which the government picks up some of the costs of a speaker's expression." Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 SUP. CT. REV. 29, 50-51.

n69 The argument that public forum doctrine governs public spending for private speech dovetails with Alexander Meiklejohn's conception of the public forum. Meiklejohn commented on

how inadequate, to the degree of non-existence, are our public provisions for active discussions among the members of our self-governing society. As we try to create and enlarge freedom, such universal discussion is imperative, In every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy.
Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 260 (emphasis added). Meiklejohn's vision of the public forum recognizes that for a public forum to offer a valuable range and quality of speech, the government must act positively to create and support public fora. By inextricably linking funding and speaking, this model obscures the line between passively tolerating free speech in public places and actively encouraging it by creating fora for speech at public expense.

n70 A district court noted that the university's refusal in Widmar "to 'subsidize' the religious group by allowing it the free use of facilities granted other student groups' amounted to an infringement on group members' right to associate. Swope v. Lubbers, 560 F. Supp. 1328, 1332-33 (W.D. Mich. 1983) (emphasis added).

n71 David Cole's recent analysis of public subsidies for speech supports the view that the principle of government neutrality governs both access to certain spaces and resources for speech within those spaces. David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. REV. 675, 709-10 (1992). Professor Cole argues that a "republican" conception of the First Amendment is not content with government noninterference with private speech, but encourages the maintenance of public institutions which encourage "ordinary people" to engage in "ongoing dialogue about public values and norms." Id. at 709-10. Maintenance of public fora is a means whereby the government subsidizes speech. Professor Cole argues that the reason public forum doctrine forbids all content-based discrimination -- and not just the viewpoint-based discrimination that standard subsidy doctrine forbids -- is that (1) the public property at issue plays a critical role in public debate, and (2) the public spaces at issue are "dedicated to, or at least consistent with, expression, [so] their functioning will not be hindered by a neutrality mandate." Id. at 718. In granting funds for speech within these "institutional spheres of independence and neutrality," id. at 681, the government must remain neutral toward the content of applicants' speech. Thus, public forum doctrine is not distinguishable from subsidy doctrine simply because one involves passive tolerance of speech while the other involves active funding of speech.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Even a paradigmatic public forum case such as Perry Education Association v. Perry Local Educators' Association n72 reveals the fallacy of distinguishing between granting an organization access to a spatial forum and subsidizing its speech within that forum. Perry is conventionally thought of as a case about access to a spatial forum, school district mailboxes. However, the plaintiffs in Perry did not simply want access to the mailboxes as space in which to transmit speech -- they wanted to take advantage of the interschool mail delivery system. n73 Access to the public forum of the mail system was desirable because it constituted subsidized transmission of messages to teachers. n74 Comparably, student organizations that seek access to mandatory funds are not barred from speaking within the forum. They have a formal right to use the forum for communication, but, after Smith, if the content of their speech is political, their right to use the forum is detached from a valuable subsidy to support use of the forum -- a subsidy that other forum -- users are granted. Just as use of the mail system in Perry could not be separated from subsidized transmission of mail, student organizations' ability to use the campus forum cannot be separated from the ability to apply for funds to support speech within the forum on the same basis as other student organizations do.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n72 460 U.S. 37 (1983).

n73 Id. at 41. As the Court noted, the plaintiffs already had access to several different media with which to communicate to the teachers, ranging

from school bulletin boards to the U.S. mail system. Id. If the plaintiffs' goal had only been to communicate with teachers, they could have simply used the U.S. mail to send them messages at school.

n74 In Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985), the Court stated that in Perry, it had "defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situs." Id. at 801. In Perry, the Court held that the mailboxes were a nonpublic forum and thus the school district could preserve them for their intended purpose by allowing only the official union to use the mail system. 460 U.S. at 51-53. The Court decided this on the basis of a finding that the mail system had not been made available to the general public in the past, not because the mail system was too dissimilar to traditional spatial property to be considered a forum.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*2024] Recognition that use of the campus forum cannot be separated from subsidies which support that use can be seen in Healy v. James, n75 a case in which the Supreme Court held that the First Amendment places restrictions on how a public university treats student organizations. The Court held that a public university's failure to recognize a student chapter of Students for a Democratic Society (hereinafter "SDS"), thus limiting its access to university facilities and services, n76 violated students' First Amendment right to associate to further their personal beliefs and participate in the "intellectual give and take of campus debate." n77 The Court discussed the difficulty of distinguishing a forum analysis from a subsidy analysis in the campus setting: Refusal to subsidize a group's speech can seriously hamper the group's ability to participate in the public forum. "We are not free," the Court stated, "to disregard the practical realities" n78 that a denial of university funding would pose for the group. The Court recognized that allowing the group to exist while denying it free use of university facilities for meetings and university media for communication "does not ameliorate significantly the disabilities imposed" by nonrecognition. n79 The First Amendment mandated that SDS' political speech not only be tolerated within a certain public space, but also that its use of that space for expression be supported by the university according to the same guidelines which provided other organizations support for expressive activities.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n75 408 U.S. 169 (1972).

n76 While the administration of Central Connecticut State College did not forbid the group from forming and speaking on campus, denial of official recognition meant that students could not use the student newspaper and campus bulletin boards to advertise the group's meetings and other activities, and that the group could not use campus facilities to hold meetings. Id. at 176.

n77 Id. at 181.

n78 Id. at 183.

n79 Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. Public Forum Doctrine as Creating a Baseline Expectation of Funding on a Content-Neutral Basis

Another way of looking at the relationship between access to public space and funds for speech has to do with speakers' expectation of how they will be treated when using government resources for speech. For instance, Seth Kreimer understands public forum doctrine to be based on a theory that when the government has historically made its property available for private speech, it must continue to do so because citizens have a "baseline" expectation that they will be able to speak freely in that space. n80 In addition, Professor Kreimer sees the "principle of equality of distribution as the baseline from which allocational decisions can be judged" n81 as critical to public forum [*2025] cases. A scheme that singles out one class of speakers, denying that class benefits available to others, offends the First Amendment. If the norm is to fund speech, as it is in the context of a public university in which student organizations that comply with content-neutral regulations are generally able to receive funds with which to engage in speech, then refusing to subsidize a subset of student organizations based on the content of their speech violates the public forum doctrine when understood in terms of baseline expectations. Such a denial singles out groups that engage in speech with a particular content and deprives them of an ability to apply for funds which have historically been available to student groups and which are available to all other student organizations on the basis of content-neutral regulations. n82

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n80 Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1359 (1984).

n81 Id. at 1365.

n82 Thus Professor Kreimer analyzes Widmar v. Vincent as a case in which the university violated the Constitution not because it denied a student organization any constitutional right to the provision of meeting facilities, but because the university's rule "single[d] out for exclusion from otherwise available benefits those who exercise a particular right." Id. at 1367.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

C. Cases Treating Use of Campus Resources as a Public Forum

These related theories of public forum doctrine -- that it governs both access to space and access to funds for speech within that space, and that it governs grants for speech when speakers have a baseline expectation that grants will be distributed on a content-neutral basis -- can be seen in cases involving university control over the content of speech in programs for student expression which go beyond tolerance of speech on campus grounds. Courts have recognized that when a public university commits to support a forum for student expression, it may not justify discriminating against speakers within that forum based on the content of their speech by arguing that prior to the university's commitment to fund the forum, the speaker had no constitutional right to have his or her speech subsidized by the state.

Cases involving university-funded school newspapers, for example, rest on this positive conception of public forum doctrine. In Antonelli v. Hammond, n83 a university administration required that materials in the student newspaper be approved prior to publication, and refused to release funds necessary for the newspaper to print an article by Eldridge Cleaver. Characterizing the university setting as an open forum where the interchange of ideas should be encouraged, the court held that the university's action violated the First Amendment. The court explained that the "state is not necessarily the unrestrained master of what it creates and fosters." n84 Once a state creates a forum that is generally open for student speech, it may not selectively discriminate against speech on the basis of content or viewpoint. n85 Similarly, in Trujillo v. Love, n86 the court [*2026] observed that the student newspaper at issue had historically been perceived as a public forum for student speech, and held that when the university suspended a student editor because of the content of articles she wanted to publish, it engaged in unconstitutional content-based censorship. n87

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n83 308 F.Supp. 1329 (D. Mass. 1970).

n84 Id. at 1337.

n85 For example, in Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973), the court held that if a public university establishes a student newspaper, it cannot suppress its publication because college officials disapprove of its editorials.

n86 322 F. Supp. 1266 (D. Colo. 1971).

n87 Id. at 1270.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

The facts of Stanley v. Magrath, n88 another student newspaper case, in some ways parallel those of Smith. In Stanley, a public university newspaper had published an issue that many readers found offensive. In response, the regents changed the system for funding the student newspaper from a mandatory student activity fee to a refundable fee. The court held that the new policy was unconstitutional in that it deprived students of funds to print the newspaper because of the content of the message conveyed by the newspaper. The court's holding relied on an understanding of public forum doctrine which extends to the government's positive acts to create what the student body regards as a public forum. Had the Smith court used this conception of public forum doctrine in deciding the constitutional challenge to funding political student groups, it would have seen that cutting off mandatory funds solely to groups which engage in "political" speech violates the First Amendment.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n88 719 F.2d 279 (8th Cir. 1983).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

D. Content-Based Subsidies Distort the Forum

The basis for asserting that public forum doctrine should not recognize a distinction between access to government property for speech and access to funds for speech within that property is not only that access to spatial property is properly understood as a type of subsidy, but also that content-based discrimination in granting subsidies for speech within a public forum harms the forum. This is because funding influences the type of speech that will occur within that forum. As Owen Fiss has noted, "government subsidies are not gifts or bonuses for acts that would have occurred without them. Subsidies . . . have a productive value: they bring into existence . . . [expression] that would not have existed but for the subsidies." n89 Restrictions on the expression of certain viewpoints, whether in the form of withholding subsidies or of banning speech by effectively excising a "particular point of view from public debate . . . mutilate 'the thinking process of the community' and [are] thus incompatible with the central precepts of the first amendment." n90 Just as banning speech according to its content within a public forum defeats the goal of allowing individuals to speak -- and listeners to be exposed to speech -- on [*2027] representative viewpoints regarding topics of the day, selectively withholding funds from groups based on the viewpoint or content of their speech skews debate within the forum.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n89 Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 2087, 2096 (1991).

n90 Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 55 (1987) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960)).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Donald Beschle discusses this relationship between selective funding and skewed debate within the public forum by comparing funding of speech within a public forum to the funding of art within a public forum. Beschle asks what the consequence would be if, when the government subsidizes art within a traditional public forum such as a public park, "the government were to fund certain private displays, and withhold funding for others, based upon the viewpoints represented? . . . [T]he effect of the program will be to maximize the exposure of endorsed views and minimize the exposure of alternatives." n91 Selective government funding distorts public debate by magnifying the significance of private individuals' expression which, on the basis of its content, qualifies for government subsidies. This is deceptive because the public assumes that speech or art within a public forum is representative of views held by members of the public as opposed to officially sanctioned views. For instance, those who reasonably assume that the U.C. Berkeley campus is a public forum for student groups may not realize that some groups' speech is subsidized by the University due to its content while others' speech is not, distorting public debate in the way Beschle describes. In order for the government to support a representative, authentic public forum for the dissemination of private views, "the system may not be structured to exclude officially disapproved positions. This should be so whether the resource is a venue or a dollar." n92

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n91 Donald L. Beschle, Conditional Spending and The First Amendment: Maintaining the Commitment to Rational Liberal Dialogue, 57 MO. L. REV. 1117,

1150 (1992). One commentator suggests that selective, content-based funding may be more effective in skewing debate than content-based criminal prohibitions on speech. Cole, supra note 71, at 705. A federal district court recently recognized some of these concerns in deciding a case involving public funding of the arts. In Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992), the court rejected the NEA's argument that denial of a grant application to produce performance art was not an injury because it was a mere refusal to subsidize expressive activities rather than a barrier to their exercise. Plaintiffs' allegation that they were denied grants, or penalized, on the basis of the content of past speech, stated a claim that they had suffered an injury under the First Amendment. Id. at 1463-64. One argument plaintiffs made was that "public subsidization of art, like public funding of the press and university activities, demands government neutrality." Id. at 1472. The court agreed with the plaintiffs, affirming that both academic and artistic expression are "at the core of a democratic society's cultural and political vitality." Id. at 1473. The court focused on the concept of academic freedom as a protection of professors' speech, but the analogy can also extend to the campus as a public forum. If "goverment funding of the arts is subject to the constraints of the First Amendment," id. at 1475, such that it does not have free rein to impose content restrictions on grantees, the same should apply for government funding of speech within the campus forum.

n92 Beschle, supra note 91, at 1149.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Courts that have used public forum doctrine to decide cases regarding university discretion in funding student organizations have implicitly adopted the view that once the government funds some speech, denial of funds for speech based on its content distorts public debate in a far more invidious way than flat refusals by the government to fund any speech. The preceding cases [*2028] regarding funding student newspapers are evidence that courts have recognized this when judging the government's freedom to withdraw funding from speech in programs it has already begun to support. In Swope v. Lubbers, n93 a court stated this proposition strongly in holding that the university administration violated students' First Amendment rights by refusing to pay for the rental of X-rated films to show on campus. The court stated that "by the withholding of funds defendants have effectively ensured that a movie of which they disapprove will not be seen. . . . The label may be 'funding' but the demonstrated effect is censorship." n94 The administration's action violated students' First Amendment rights by discriminating against speech on the basis of its content regardless of the fact that a subsidy was involved. Thus, past courts have recognized that when universities offer funds to support expressive activities on a content-neutral basis, subsequent denials of funding due to the content of expression are indistinguishable from content-based prohibitions of speech.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n93 560 F. Supp. 1328 (W.D. Mich. 1983).

n94 Id. at 1332.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

E. Subsidy Doctrine and Funding Speech Within a Designated Public Forum

Notwithstanding the prior discussion, some will argue that funds that a public university grants to student groups should be analyzed separately as public subsidies of speech. Even under pure subsidy doctrine, however, cutting off subsidies from "political" speech is problematic from a First Amendment standpoint. While subsidy doctrine allows the government to incorporate values into publicly supported programs that have a speech element, subsidy cases also recognize that for public fora to be legitimate, should the state use subsidies to finance speech within the public forum, funds must be distributed on a content-neutral basis. Thus, when a subsidy is used to create a public forum, the principles of subsidy doctrine are identical to those of public forum doctrine. Courts have held that while the government may not support one viewpoint over another in distributing funds, n95 the government may define and fund a program on the basis of adopting one value over another. In Rust v. Sullivan, n96 the Court held that

the Government may make a value judgment favoring childbirth over abortion, and implement that judgment by the allocation of public funds. . . . [I]n implementing the statutory prohibition by forbidding counseling, referral, and the provision of information regarding abortion as a method of family planning, the regulations simply [*2029] ensure that appropriated funds are not used for activities, including speech, that are outside the federal program's scope. n97

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n95 Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (the government may not "discriminate individiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas'") (quoting Cammarano v. United States, 385 U.S. 498 (1959)).

n96 111 S. Ct. 1759 (1991).

n97 Id. at 1763 (citations omitted).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Title X projects were not defined to include abortion counseling, so the government could prohibit such speech. "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." n98

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n98 Id. at 1775.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Although Rust holds that the government may define and fund a project that incorporates certain values, Rust does not preclude an argument that, in some circumstances, the government must distribute funds according to the principles of public forum doctrine. In Rust, the Court distinguished situations in which the scope of the program the government funds does not extend to certain topics of speech from cases in which the government creates a public forum. n99 The

Court recognized that "the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity," or have been "expressly dedicated to speech activity.'" n100 If the purpose of a government subsidy is to maintain a space in which the public can be exposed to free speech, then, regardless of speakers' rights to subsidies, grants must be made on a content-neutral basis for the funded space to operate as a legitimate public forum from the audience's perspective. n101 For the audience, the First Amendment danger lies in the "indoctrinating effect of a monopolized marketplace of ideas" masquerading as a public forum. n102 As one commentator points out, the government can distort public debate when its influence on private speech is not obvious:

> As an initial matter, when the government itself speaks in favor of a position, we (the people) know who is talking and can evaluate the speech accordingly. . . . By contrast, when the government finances hitherto private parties to do its speaking, we may have little understanding of the source of the expression. . . . [T]he speakers may have foregone their expression (or even espoused a different view) in the absence of a subsidy. We do not know whether to treat the speakers as independent or as hired guns. . . . When the government speaks through subsidy schemes, it may change and reshape the underlying dialogue. n103

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n99 For a discussion of this distinction, see Cole, supra note 71, at 685-94.

n100 Rust, 111 S. Ct. at 1776 (citations omitted).

n101 As Professor Cole points out, when the government funds speech, "first amendment concerns are not limited to potential coercion of the subsidized speaker, but extend also, and perhaps more importantly, to the listener." Cole, supra note 71, at 680.

n102 Id.

n103 Kagan, supra note 68, at 55; see Cole, supra note 71, at 675 (arguing that when the government funds speech in certain "spheres of neutrality," including public forums and public universities, it should do so on a content-neutral basis); see also CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 233-34 (1993) (pointing out that when the government speaks, people will listen with a certain degree of skepticism, while when a private speaker speaks using government funds, people will not know if the person's expression is influenced by the government subsidy program's content-biases); cf. Post, supra note 67, at 1833-34 (arguing that when the government exercises "managerial" authority, nonpublic forum guidelines should apply, but when the government exercises its "governance" authority over the public realm, traditional public forum guidelines should apply).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*2030] Thus, when subsidies can be characterized as public fora, or when subsidies are used in a program that the public understands to support private speech on a content-neutral basis, the standards of public forum doctrine apply.

The U.C. Berkeley campus, like other public university campuses, is a public forum in which all student organizations may speak, but under Smith, only nonpolitical organizations qualify to receive funding from mandatory student fees. To the outside observer, it appears that student organizations speak within the campus forum according to how strongly their members feel or how many members they have, but in reality "apolitical" groups will be subsidized while "political" groups will not. The observer will be unaware of the disparity in subsidization between groups and thus will misinterpret the debate within the forum. For the University to create and support a legitimate public forum for student speech, it must be permitted to make content-neutral grants to student organizations that wish to speak within the forum.

Once the university creates and funds a forum for campus speech, it has an obligation not to discriminate against student groups based on the viewpoint or content of their speech. Resources of space as well as money enable student groups to speak on campus through such forms as speaker programs, films, newsletters, leaflets, signs, and advertisements announcing meetings and events. By classifying a group as "political" under the Smith plan, one relegates it to seeking voluntary contributions from students each semester. For the campus grounds to function as a true public forum, the relationship between money and speech cannot be ignored while the relationship between space and speech is venerated by the public forum doctrine.

IV. DISCRIMINATION AGAINST POLITICAL AND IDEOLOGICAL SPEECH AS VIEWPOINT-BASED DISCRIMINATION

Even if the public university campus is properly considered a public forum, for the sake of argument it is worth considering a contention that public forum doctrine does not apply to the question of whether the University can deny funding to all "political" and "ideological" student groups. n104 For example, one might believe that the fact that funded speech will take place within a public forum is irrelevant, and the appropriate doctrine for deciding [*2031] whether the University may refuse to fund only "political" student groups would be standard subsidy doctrine. The governing subsidy doctrine case on this question is Regan v. Taxation with Representation, n105 in which the Court held that Congress would not violate the Constitution if it chose "not to subsidize lobbying as extensively as it chose to subsidize other activities." n106 The government is only required to be neutral as to the viewpoint, or "idea," expressed by the speaker in granting a subsidy. n107 According to several commentators' interpretation of pure subsidy doctrine, "a university decision not to fund any political speech is a decision based upon neutral principles because it does not discriminate among political viewpoints." n108 In order to determine whether or not a subject matter restriction should be analyzed as though it constituted viewpoint-based discrimination, Professor Stone suggests examining the restriction and determining whether in practice it will have a more severe impact on one viewpoint than another. n109 "[N]arrowly defined subject-matter restrictions having a clear viewpoint-differential impact seem to implicate directly both of the concerns underlying the Court's special treatment of content-based restrictions," which are to create a marketplace of ideas and to demonstrate government impartiality. n110

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n104 See, e.g., Elizabeth E. Gordon, Comment, University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and

Subsidy Doctrines, 1991 U. CHI. LEGAL F. 393, 412; see also Christina E. Wells, Comment, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U. CHI. L. REV. 363, 388 (1988).

n105 461 U.S. 540 (1983).

n106 Id. at 544.

n107 Id. at 548.

n108 Wells, supra note 104, at 388. Geoffrey Stone suggests that a ban on "political" speech operates as "subject-matter" discrimination rather than viewpoint-based discrimination. Geoffrey R. Stone, Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. CHI. L. REV, 81, 112 (1978). Cass Sunstein points out that in some circumstances, the Supreme Court has permitted a ban on political speech on public property. SUNSTEIN, supra note 103, at 172 (referring to Greer v. Spock, 418 U.S. 298 (1974), permitting ban on partisan political speech at army bases, and Lehman v. Shaker Heights, 418 U.S. 298 (1974), permitting ban on political advertisements in buses).

n109 Stone, supra note 108, at 109-10.

n110 Id. at 111.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This Part argues that, in application, a refusal to fund "political" and "ideological" speech is likely to result in harmful viewpoint-based discrimination. If one looks at recent Supreme Court cases dealing with speech, an argument can be made that, at least in certain contexts, the adjective "political" describes a viewpoint rather than subject matter. In addition, if one looks at student speech in practice, one can see that withholding funds from "political" and "ideological" student groups amounts to viewpoint-based discrimination.

A. Regulation Based on Content, Subject Matter, and Viewpoint

As an initial matter, it is useful to consider how the Court has defined "viewpoint discrimination." Courts have identified three types of speech regulations as potentially problematic-those that limit speech on the basis of content, subject matter, and viewpoint. Courts have had difficulty, however, in [*2032] clearly and consistently defining the difference between them. The "content based" term attempts to distinguish regulations that govern speech according to the message conveyed (content-based) from those which regulate speech without regard to the message conveyed (content-neutral). n111 For example, while a law that restricts noisy speech near a hospital is content-neutral because it limits speech without regard to the message conveyed, n112 a law that restricts speech about labor disputes near a hospital is content-based since it regulates speech according to the message conveyed. Whereas content neutral laws may limit the time, place, and manner of speech in any forum, all content-based restrictions are forbidden in traditional and designated public fora absent a compelling state interest. n113

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n111 Stone, supra note 90, at 47-50.

n112 Id. at 48.

n113 See supra note 65.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Within the category of "content-based" regulations, courts have distinguished between those that regulate an entire "general subject" and those that regulate according to the viewpoint conveyed. For example, a law prohibiting all picketing near a hospital except that involving labor disputes would be a subject matter restriction, n114 whereas a law allowing picketing in favor of a strike but prohibiting picketing against a strike would be viewpoint based. n115 As noted above, the government may discriminate on the basis of subject matter, but not viewpoint, in distributing subsidies for speech. n116

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n114 Such a law would restrict expressive conduct according to a "classification[] formulated in terms of the subject" of expression. Police Dep't v. Moseley, 408 U.S. 92, 95 (1972); see also Stone, supra note 90, at 86.

n115 This sort of law would be viewpoint based since it regulates speech according to whether one supports or opposes a certain action. See also Justice Brennan's distinction between regulations pertaining to the subject of discussion and those pertaining to views on that subject. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59, 61 (1983) (Brennan, J., dissenting) (citing Stone, supra note 90).

n116 See supra note 107 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. "Political" and "Ideological" as Viewpoints

The Court seems to have already recognized that regulations that discriminate against certain controversial subjects are in fact viewpoint-based. In Lamb's Chapel v. Center Moriches Union Free School District, n117 the Court held that in granting use of its facilities, a school district violated the Free Speech Clause of the First Amendment when it discriminated against organizations that wished to use the facilities for religious purposes. n118 The Court held that even if the school facilities were a nonpublic forum, n119 discriminating against religious groups is viewpoint-based because it allows [*2033] use of school property for presentation of all views about certain subjects "except those dealing with the subject matter from a religious standpoint." n120

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n117 113 S. Ct. 2141 (1993).

n118 Id. at 2147.

n119 Recall that in nonpublic forums, content-based discrimination is allowed but viewpoint-based discrimination is prohibited. See Perry, 460 U.S. at 46.

n120 Lamb's Chapel, 113 S. Ct. at 2147.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The court's treatment of "religious" as a point of view suggests that categories of speech that might have once been considered subject matter- or content-based may now be considered viewpoint-based. If speech that deals with families from a religious perspective can be characterized as speech on the subject of families from a religious point of view, it is difficult to see why speech on, for instance, the subject of the environment from a political perspective is not speech on an apolitical subject from a political point of view. When a certain viewpoint is so closely tied to a particular subject that to prohibit discussion of the subject silences speakers with that point of view (as a ban on speech about religion would do for speakers with a religious point of view), the Court has indicated that it is appropriate to recognize that what appears to be subject matter discrimination functions as viewpoint discrimination. Just as the Court regarded speech that incorporates a religious view of the world as speech of a particular viewpoint, speech that is informed by a political view of the world should be categorized as viewpoint-based, following the reasoning of Lamb's Chapel.

C. Discrimination Against "Political" and "Ideological" Speech as Viewpoint-Based in Practice

In practice, a refusal to allow "political" and "ideological" student groups to apply for mandatory funds amounts to viewpoint discrimination. Consider, for example, Gay & Lesbian Students Ass'n v. Gohn, a case challenging a rule prohibiting the funding of any student group "organized around sexual preference." n121 It is easy to see how such a subject matter restriction can fit into a campaign to silence gay and lesbian student groups on the basis of their "view" about homosexuality. n122 In response to a refusal to fund a student organization in the context of such a campaign, the Eighth Circuit held that discrimination in funding on the basis of distaste for a group's ideas violates the Constitution because

a public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis [*2034] of their ideology. The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed. n123

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n121 Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 364 (8th Cir. 1988). The Student Senate at the University of Arkansas, Fayetteville, passed this regulation, but because the rule was vetoed by the student association president before it could take effect, the court did not rule on its constitutionality. The court's holding pertains to the university's refusal to fund the Gay & Lesbian Student Association in light of a history of attempts to deny support to the group because of the content of its speech.

n122 The plaintiffs' attorney in Smith claimed that a ban on funding "political" speech with mandatory activity fees will prohibit funding the Gay and Lesbian Student Union at Berkeley, illustrating how the facially neutral ban on "political" speech may behave in a similarly viewpoint-biased way. Hager, supra note 12, at A3.

n123 Gohn, 850 F.2d at 362.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

When the subject matter of which a group speaks is inherently controversial, it is difficult to categorize the discrimination against it as either content-based or viewpoint-based. While "sexual preference" is a subject, the restriction will disparately impact students who hold the more controversial view on the subject. Students who practice or believe in heterosexuality do not have the same need to organize for support and education as students who practice or believe in homosexuality; mainstream culture is geared towards heterosexuality, obviating the need for a person who supports heterosexuality to take a political stand on the issue. Notwithstanding claims by the student association that they refused to fund the group for viewpoint-neutral reasons, the Eighth Circuit had no difficulty characterizing the entire campaign of which the proposed ban was a part as impermissible discrimination on the basis of ideology. n124

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n124 Id. at 366-68.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Without explicitly acknowledging it, the Supreme Court seemed to adopt this approach to determining whether a regulation is viewpoint-based or subject matter-based in R.A.V. v. City of St. Paul. n125 In Justice Scalia's majority opinion, the Court held that a city ordinance criminalizing symbolic speech that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" n126 is unconstitutional because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." n127 One could argue, as Justice Stevens did in his concurrence, that the ordinance was viewpoint-neutral, or only discriminated on the basis of subject matter, because it concerned all "fighting words" based on a person's race, color, creed, religion, or gender. n128 However, in delivering the majority opinion, Justice Scalia did not distinguish subject matter- and viewpoint-based discrimination. He argued that the ordinance was unconstitutional because in operation it would discriminate on the basis of viewpoint -- it would leave unregulated nonracist fighting words uttered by opponents of racism, but prohibit racist statements by proponents of racism.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n125 112 S. Ct. 2538 (1992).

n126 St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minneapolis Legis. Code @ 292.02 (1990).

n127 R.A.V., 112 S. Ct. at 2542 (emphasis added).

n128 Id. at 2570-71 (Stevens, J., concurring).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

An analogy to R.A.V. can be made when analyzing discrimination against political speech. As Justice Stevens pointed out in his concurrence, a ban on hurtful racist speech is in one sense viewpoint-neutral -- it protects members of [*2035] all races who are insulted on the basis of their race. n129 Similarly, some might argue, a rule that no "political" student groups may apply for funds generated by mandatory student fees could be characterized as viewpoint-neutral because it applies to all "political" groups regardless of the particular viewpoint that they espouse. However, in R.A.V. the majority characterized the ban as viewpoint-based, because the ordinance criminalized the speech of those who want to use fighting words to express a view of the world informed by racism -- or racist fighting words -- while it did not restrict the speech of people who want to use fighting words to express a view of the world informed by some other system of ordering reality. Could not the same be said for discriminating against student groups that want to speak about the world in terms of politics instead of, for instance, athletic rivalries? n130

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n129 Id. at 2571.

n130 If R.A.V. only applies to laws that discriminate against speech within the realm of fighting words, the analogy does not work. To the majority, however, the crucial point was that the speech was used in debate by speakers who held a certain viewpoint, not that the words were fighting words. In the majority opinion, Justice Scalia stated that "[a]ssuming, arguendo, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." Id. at 2542.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

For instance, one group Smith identifies as "political" is the U.C. Berkeley Feminist Alliance and Women Organized Against Sexual Harassment (FAWOASH). FAWOASH might not limit its political opponents to antifeminist "political" groups. FAWOASH might also oppose aspects of campus culture, such as the football team, which, while not "political" in a narrow sense of the term, have been linked to campus sexual harassment and rape of women. n131 The impact of the Smith order on FAWOASH would be viewpoint-neutral in a narrow sense -- just as FAWOASH's speech would decrease under the activity fee system ordered by Smith, so would the speech of its opponents, a hypothetical group which takes an anti-feminist position on political issues. n132 The claim that the Smith order is therefore viewpoint-neutral parallels Justice Stevens' claim that the ordinance in R.A.V. was viewpoint-neutral: both the speech of those who wish to offend people on the basis of being black and those who wish to offend people on the basis of being white or any other race are banned, so the ordinance is neutral.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

-

n131 According to Bernice Sandler, director of the Project on the Status of Women for the Association of American Colleges, 80-90% of men involved in college gang rapes are members of fraternities or student athletic groups, usually football or basketball teams. William Douglas, Disturbing Pattern Seen in Gang Rapes; Many Linked to Male Rites of 'Bonding', NEWSDAY, May 13, 1990, at 2. Indeed, a charge of gang rape made against four football players in 1986 precipitated the formation of a campus anti-rape coalition at U.C. Berkeley, a group which can be compared to FAWOASH. Coeds Stage Anti-Rape Rally on Berkeley Campus, UPI, Dec. 6, 1986, available in LEXIS, Nexis Library, UPI File.

n132 Comparably, under the Smith system, pro-choice and anti-choice student organizations would be hurt to the same degree.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Justice Scalia, however, was concerned with a different type of opponent in the debate. This opponent does not wish to use speech to express an opposing view within racist discourse, but instead wants to argue that people [*2036] should not be valued on the basis of their race. In other words, Justice Scalia was not concerned with debate between white supremacists and black supremacists, but with argument between racists and groups who do not think the world should be ordered in terms of race. Justice Scalia's concern was that opponents of racism would be free to use the fighting words of their choice -- non-racist fighting words -- to offend racists, while the racists could not use the fighting words of their choice -- racist fighting words -- to fight back. n133

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n133 Justice Scalia argued that the ordinance would "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." R.A.V., 112 S. Ct. at 2548.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The analogue to the nonracist group in the FAWOASH example would be a group of students who do not believe that institutions such as the school football team are "political." Like the Smith court, these students are likely to conclude quickly that a group such as FAWOASH, which concerns itself with rape and sexual harassment, is clearly "political," whereas the school football team has nothing to do with rape and sexual harassment, and is therefore apolitical. However, it is not irrational to believe that such institutions as the school football team are intimately connected with campus rape and sexual harassment. n134 Rather than acknowledging that, from some students' perspective, support for the football team is in direct opposition with a movement to eliminate rape on campus, the Smith opinion incorporates the worldview of students who do not think that campus institutions conventionally characterized as apolitical should be analyzed as political. Under Smith, students could form an organization such as a Yell Leaders Club, which uses speech to support the football team. This group may not engage in obviously political anti-feminist speech, but its unreflecting support of the football team implicitly rejects the idea that the political issues of rape and sexual harassment are linked to such programs. Because support of the football team is not generally (or in Smith) considered political or ideological, these students will be able to use mandatory

activity fee funds to communicate, while FAWOASH, a "political" group, will not. This differential treatment amounts to the type of viewpoint-discrimination that led the R.A.V. majority to hold that a ban on hurtful "racist" fighting words was inherently viewpoint-based.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n134 See supra note 131.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In the college campus context, groups that believe that campus life is political frequently come into conflict with campus groups that believe that the commonplaces of college life are apolitical. Campus debate often takes the form of opposition between groups that oppose the status quo and are therefore "political," and those that support the status quo and thus do not encourage students to think about politics at all. To return to the example of the Gay and Lesbian Student Union, plaintiffs have suggested that this group will be viewed as "ideological," but neither side has suggested that student groups concerned [*2037] with heterosexuality will also be considered "ideological." Moreover, even if the University determined that a group concerned with homosexuality is no more ideological than a group concerned with heterosexuality, the group concerned with homosexuality will have far more reason to discuss politics than will the heterosexual group. The group concerned with homosexuality opposes the status quo, and part of such a stance means opposing legislation specifically addressed at homosexual men and women. n135 The heterosexual group does not face analogous political opposition, and thus has no corresponding need to become politicized.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n135 See, e.g., Steven A. Holmes, Gay Rights Advocates Brace for Ballot Fights, N.Y. TIMES, Jan. 12, 1994, at A17 (eight states may have ballot initiatives this year seeking to restrict rights of homosexual men and women).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Professor Fiss urges looking at the impact of seemingly neutral criteria used in making allocation decisions; the "ideal of neutrality in the speech context not only requires that the state refrain from choosing among viewpoints, but also that it not structure public discourse in such a way as to favor one viewpoint over another. The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard." n136 While the funding system ordered in Smith is neutral as between progressive and conservative "political" student groups, it does discriminate between groups that support and groups that oppose the status quo. Under Smith, the speech of complacent mainstream groups will be subsidized, but not that of their politicized opponents. This discrimination is viewpoint-based because the government will support the speech of those with a mainstream view of public issues while withholding support from those who challenge that view. This dynamic returns us to the original argument that the Smith court should have given more weight to the fact that the University was attempting to support a diverse range of student speech when it decided whether funding political student organizations was germane to the University's purpose: Funding political groups was germane to the program's purpose -- to support a diversity of

student speech -- because a funding program which does not ban applications from political student organizations is far more valuable to the university in carrying out its mission to educate by supporting a campus forum for debate.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n136 Fiss, supra note 89, at 2100. Cass Sunstein also notes that the First Amendment has the structural goal of promoting a certain kind of deliberative process . . . if the government is permitted to obtain a number of enforceable waivers of the free speech right [for example, waiver of the right to speak about political issues in exchange for the benefit of a subsidy for speech], the aggregate effect may be substantial, and the deliberative processes of the public will be skewed.
SUNSTEIN, supra note 103, at 115.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*2038] VI. CONCLUSION

Because the Smith court failed to perceive the fee system as a means of funding a public forum for student speech, a factor critical to the constitutionality of the system, public forum doctrine had no bearing on the decision. If one analyzes subsidized speech on university campus grounds in light of the fact that the university is a public forum with respect to its students, however, one can see that under the forced association doctrine, content-neutral funding is not only permitted but required.

Prior to Smith, the mandatory fee system at U.C. Berkeley strove to allow students' interests and convictions to guide what speech would be funded within the forum. Students were free to form organizations and request funds under content-neutral guidelines. Organizations could then use the funds to advocate positions within the forum on behalf of their organization, not the entire student body. This system not only avoided the constitutional evil of compelling students to identify themselves personally with particular viewpoints taken by various student organizations, but it also contributed to the educational experience Berkeley sought to offer its students. n137 Undoubtedly many public university students will view the Smith opinion as an invitation to challenge mandatory fee systems within their own universities. n138 This Note has argued that courts faced with these challenges in the future should incorporate a deeper appreciation than did the Smith court for the doctrine and policy goals relating to support for speech within public fora, as well as the tradition within higher education of actively encouraging free debate on controversial public matters.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n137 Recently, the importance of university provision for, not merely tolerance of, student involvement in public life has been emphasized by a national group studying what purposes higher education in the United States should serve. For example, the group reported that it wanted "to stress that society's needs will be well served if colleges and universities wholeheartedly commit themselves to providing students with opportunities . . . [for] first-hand experience, such as contributing to the well-being of others, [and] participating in political campaigns." WINGSPREAD GROUP ON HIGHER EDUCATION, AN AMERICAN IMPERATIVE: HIGHER EXPECTATIONS FOR HIGHER EDUCATION 10 (1993); see

also id. at 66, 123.

n138 The reasoning of Smith could be extended to use of student fees for any controversial expression regarding public matters. One commentator argues that just as college students' associational interests are infringed upon when a portion of their fees is used to fund political speech with which they disagree, law school students' associational interests are infringed upon when their tuition or fees partially go toward subsidizing loan forgiveness for students working at organizations that take political positions with which some of the students disagree. Luize E. Zubrow, Is Loan Forgiveness Divine? Another View, 59 GEO. WASH. L. REV. 451, 527-30 (1991).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

LEVEL 1 - 95 OF 96 ITEMS

Yale Law Journal

May, 1993

102 Yale L.J. 1611

LENGTH: 21006 words

ARTICLE: The Political Balance of the Religion Clauses.

Abner S. Greene +

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

+ Assistant Professor of Law, University of Chicago Law School. I am grateful to the Russell J. Parsons Faculty Research Fund and the Harry Kalven Jr. Memorial Fund for financial assistance. Thanks also for helpful comments from participants at the University of Chicago Work-in-Progress Luncheon and the University of Chicago Milwaukee Alumni Luncheon. Many people have contributed to my thinking about this Article, none more significantly than my colleague Michael McConnell, to whom I owe a special debt of gratitude. Thanks also for helpful comments to Al Alschuler, Mary Becker, Dana Chasin, Ned Foley, Maggie Hume, Judy Greene, Elena Kagan, Jeremy Karpatkin, Jessica Korn, Larry Lessig, Geoff Miller, Randy Moss, John Nagle, Clarence Pollard, Richard Posner, Josh Rosenkranz, Matt Shapiro, Julie Sheehan, Joe Slater, Chris Sprigman, Geof Stone, David Strauss, and Cass Sunstein.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

SUMMARY:

... Without paying much attention to this issue, the Warren and Burger Courts read the Establishment Clause to invalidate legislation with a predominant religious purpose, while reading the Free Exercise Clause to give individuals a prima facie right to exemption from laws that burden their religious practices. ... Although secular as well as religious belief might be divisive, might rely on a nongovernmental source of authority, and might not be provable, only religious belief involves reference to an extrahuman source of value, of normative authority. ... According to this argument, if a legislator is apprised of the claim of religious truth animating a particular bill, and if the legislator votes against the bill, the legislator will have taken the position that the religious claim is false. ... Finally, I want to address the following question: What if someone asks for an exemption from an otherwise valid law based not on religious faith but on moral, political, or philosophical values? In this Part, I explain that although the Constitution should be read to require exemptions for religious conscience, exemptions for secular conscience should receive no such protection. ...

TEXT:

[*1611] When the Supreme Court held in Employment Division v. Smith n1 that the Free Exercise Clause does not protect religious practices from otherwise valid laws that incidentally burden those practices, it followed a particular theory of democratic politics. That some laws might unintentionally burden

certain religious practices is, said the Court, an "unavoidable consequence of democratic government [that] must be preferred to a system in which each conscience is a law unto itself." n2 The Court was certainly right in one sense: To claim that conscientious objection to an otherwise valid law should exempt one from that law is to claim that one's values should prevail over the values chosen by the majority. Reading the Constitution to require such exemptions as a matter of right would indeed render each conscience a law unto itself. Although not stated explicitly, the Court's theory of democratic politics recognizes that there will be winners and losers in the political marketplace, where value competes against value for adoption as law. So long as one is able to participate in that competition, one cannot claim a constitutional right to avoid obedience merely because one's values were defeated by a competing set of values that one finds objectionable. Losers as well as winners are bound by the outcome of an open democratic political process.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 494 U.S. 872 (1990) (holding that general state law regarding controlled substances may be applied to sacramental use of peyote in Native American Church, and that state may deny unemployment benefits to people discharged from job for such use).

n2 Id. at 890.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

By applying this theory of democratic politics in Smith, however, the Court revealed that it does not take religious values seriously as a special source of conscientious objection. In fact, neither the Justices nor commentators have articulated a theory of the religion clauses that accounts for the proper role of religion in politics. Without paying much attention to this issue, the Warren and Burger Courts read the Establishment Clause to invalidate legislation with [*1612] a predominant religious purpose, n3 while reading the Free Exercise Clause to give individuals a prima facie right n4 to exemption from laws that burden their religious practices. n5 But this doctrine often was accused of being internally inconsistent, on the theory that religious exemptions infringe Establishment Clause values. Some scholars have defended the doctrine. n6 Others have tried to change it: One group favors a strong reading of the Establishment Clause but opposes Free Exercise Clause exemptions, n7 while another group supports the exemptions but also argues for a weaker reading of the Establishment Clause. n8 Neither supporters nor critics of the doctrine, however, have demonstrated that religion is special in a way that invalidates the theory of democratic politics relied on in Smith. This failure allowed the Smith Court to conclude that there is no good constitutional reason to privilege religious values by requiring an exemption from otherwise valid law for people who hold those values. n9 Equipped with Smith's implicit predicate that religious values can compete equally with secular values in the political arena, the Rehnquist Court is in position to validate legislation backed by a predominantly religious purpose, thus accomplishing a complete inversion of prior doctrine.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971); see also Edwards v. Aguillard, 482 U.S. 578, 590-91 (1987); infra Part I(A)(3).

n4 The right is only prima facie because the government's interest in universal adherence to the law in question might be strong enough to outweigh the claimant's interest in not obeying the law. Thus, a balancing test is necessary. Throughout this Article, although I refer to "exemptions," I am discussing the prima facie right to such exemptions. How the government's interest should be balanced against the claimant's interest is a question I shall not address here.

n5 See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). There is good, though not undisputed, historical evidence that the Free Exercise Clause was intended to provide religious exemptions from otherwise valid law. See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409 (1990). But see Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 GEO. WASH. L. REV. 915 (1992) (challenging McConnell's analysis). I take no position on the McConnell/Hamburger debate. Instead, my argument will be based on an interpretation of the religion clauses that fits with a widely accepted premise of liberal democratic theory as embodied in our Constitution, which I discuss briefly in the text below.

n6 See, e.g., Kathleen Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195 (1992).

n7 See, e.g., William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. CHI. L. REV. 308 (1991) [hereinafter Marshall, Defense]; William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 7 J.L. & RELIGION 363 (1989) [hereinafter Marshall, Case Against].

n8 See, e.g., Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115 (1992).

n9 Smith left open Free Exercise Clause challenges to laws that seek to burden religion, distinguishing such laws from laws that incidentally burden religion. See Smith, 494 U.S. at 877-78. This Term's Free Exercise Clause case, Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), aff'd, 936 F.2d 586 (11th Cir. 1991), cert. granted, 112 S. Ct. 1472 (1992), offers the Court an excellent opportunity to invalidate an ordinance that was intended to burden religion.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This Article seeks to explain the relationship between the religion clauses in a way that accounts for the proper role of religion in politics, and in so doing offers a new defense of the embattled religion-clause doctrine of the [*1613] Warren and Burger Courts. n10 In brief, I argue that the Establishment Clause should be read to forbid enacting legislation for the express purpose of advancing the values believed to be commanded by religion. n11 Precisely because religion should be excluded from politics in this way, my argument continues, the Free Exercise Clause requires the recognition of religious faith as a ground for exemption from legal obligation. Thus, I reject Smith's implicit political predicate that all values may be offered for majority support to be enacted into law. If the Establishment Clause should be read to place a special burden on

the role of religious values in politics, then those values should receive special treatment when they conflict with the values adopted by the legislature. Reading the Free Exercise Clause to require exemptions from law neither favors religion nor renders religious conscience "a law unto itself." Rather, these exemptions are merely the appropriate remedy for the damage that precluding religious values from grounding law causes religious people.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n10 Some scholars properly have suggested that Free Exercise Clause exemptions do not privilege religion but rather offset the special Establishment Clause hurdle that religion must face. But a theory of how this offset works, and how such an offset might invalidate Smith's implicit theory of democratic politics, has not been articulated. See Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 719, 729 (1992) [hereinafter McConnell, Update] (arguing that "the government must 'single out' religion in both free exercise and establishment contexts," and that supposed benefits from Free Exercise Clause exemptions "are balanced by the disadvantages to religion from the Establishment Clause"); Michael W. McConnell, A Response to Professor Marshall, 58 U. CHI. L. REV. 329, 329 (1991) (citing "the symmetrical character of the free exercise and establishment principles" to rebut claim that free-exercise exemptions constitute "favoritism" for religion); Sullivan, supra note 6, at 206 (describing the Establishment Clause as placing a "disability" on religion); id. at 222 ("The price of this truce is the banishment of religion from the public square, but the reward should be allowing religious subcultures to withdraw from regulation insofar as compatible with peaceful diarchic coexistence.").

n11 A note about terminology: Throughout this Article, I use a variety of terms to describe the values believed to be commanded by one's religion. I refer interchangeably to religious values, beliefs, premises, and commands. Although in another essay the differences among these terms might matter, here they do not. Or at least I hope they will not matter to the comprehensibility and validity of the arguments I advance.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

This political calculus of the religion clauses rests on what I believe to be a widely accepted premise of liberal democratic theory -- namely, that the legitimacy of legal obligation turns, in part, on the ability of citizens to offer their values for adoption as law. Many elements of our Constitution rest on this premise: The Freedom of Speech and Freedom of the Press Clauses, the Petition Clause, and the various provisions regarding voting rights all embody our constitutional commitment to unencumbered political participation as a predicate for legitimate governmental coercion. To be sure, we accept many departures from the norm of full political participation. But to base legislation expressly on a source of value to which some citizens lack access, or to refuse to base legislation on a source of value that some citizens hold dear, is a significant exclusion that undermines the legitimacy of the government's claim to obedience.

[*1614] Both aspects of this Article address this problem. The Establishment Clause, I argue in Part I, protects against the exclusion of nonbelievers from meaningful political debate by making it unconstitutional to base law expressly on religious faith. This solution, however, excludes

religious believers from full political participation. I argue in Part II that the Free Exercise Clause mitigates the effects of that exclusion. Finally, I explain in Part III why the Constitution should not be read to require exemptions for claims of secular conscience.

I. THE ESTABLISHMENT CLAUSE PROSCRIPTION AGAINST ENACTING RELIGIOUS FAITH INTO LAW

My central claim in this Part is that the Establishment Clause, properly understood, prohibits enacting religious faith into law, by which I mean enacting legislation for the express purpose of advancing the values believed to be commanded by religion. Although the Court and many commentators have accepted the notion that laws must have a dominant secular purpose, there is still considerable controversy over the role of religious values in animating the passage of law. I first discuss, in Part I(A), what makes religious values different from secular ones and justifies at least their partial exclusion from the political process. I focus on what seems to be their chief distinguishing characteristic -- their reference to an extrahuman source of value. Basing law expressly on values whose authority cannot be shared by citizens as citizens, but only by those who take a leap of faith, excludes those who do not share the faith from meaningful participation in political discourse and from meaningful access to the source of normative authority predicating law. Requiring that secular analogues be found for religious values, and demanding that the secular purpose be dominant rather than merely present and express rather than merely plausible, ensures that political debate remains a discussion of politics and not religion, and hence that nonreligious people have meaningful access to the terms of the political debate. I next seek to explain, in Part I(B), why legislation that accommodates religious practices does not violate the Establishment Clause as I read it. Finally, in Part I(C), I address some important objections to my view of the role of religious values in politics.

A. The Special Problem Posed by Religious Faith: Reference to an Extrahuman Source of Value

Under current Supreme Court doctrine, the Establishment Clause is violated if legislation is backed by a "dominant motive to impose or promote [*1615] a particular religious view." n12 But the role of religious purpose in the Court's Establishment Clause jurisprudence appears open to question, n13 and the proper relationship between religious values and political outcomes is hotly debated in the academy. Although they differ significantly over questions of degree, Franklin Gamwell, n14 Kent Greenawalt, n15 Stephen Pepper, n16 Michael Perry, n17 and Kathleen Sullivan n18 all have supported the view that it is improper to enact legislation for a religious purpose. Steven Smith, n19 David Smolin, n20 and (to a somewhat lesser degree) Michael McConnell n21 have taken the contrary view.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 245 (1988); see Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968). In these cases invalidating legislation under the Establishment Clause, the Court has variously identified the problem as being that of a religious reason, justification, purpose, motive, objective, or intention. I will generally refer to a law's "purpose." See infra Part

I(A)(3) (discussing these cases).

n13 See County of Allegheny v. ACLU, 492 U.S. 573, 655-63 (1989) (Kennedy, J., concurring and dissenting); Edwards, 482 U.S. at 610 (Scalia, J., dissenting). It is unclear whether Justice Kennedy's views have shifted between Allegheny and the recent Lee v. Weisman, 112 S. Ct. 2649 (1992), in which he wrote the Court's opinion holding unconstitutional a prayer at a public-school graduation. Lee indicates that Kennedy is especially concerned about coercion in the school-prayer setting, a concern that would not carry over to many of the problems I discuss here.

n14 See Franklin Gamwell, Religion and Reason in American Politics, 2 J.L. & RELIGION 325, 338-39 (1984) (arguing that it is permissible to introduce religious convictions into public debate, so long as those doing so "defend their convictions by appeal to considerations that can be assessed by all members of the public").

n15 See GREENAWALT, supra note 12, at 16-21 (saying that government may not "directly aim" at furthering religious beliefs); id. at 20 (noting that law must "rest on some secular objective").

n16 See Stephen Pepper, A Brief for the Free Exercise Clause, 7 J.L. & RELIGION 323, 332 (1989) ("The establishment clause makes sense . . . as a guarantor of secular government.").

n17 See MICHAEL J. PERRY, LOVE AND POWER 105-12 (1991). According to Perry, "public accessibility" is a prerequisite to ecumenical political dialogue, which can include religious as well as secular values. Perry would preclude appeals based on experiences, premises, people, or institutions that have authority only within the confines of a religious community. The Establishment Clause, he says, forbids endorsement of a particular religious faith, and proper ecumenical political dialogue depends on translating religious faith into secular premises.

n18 See Sullivan, supra note 6, at 197 (arguing that Establishment Clause sets up "affirmative 'establishment' of a civil order for the resolution of public moral disputes"); id. at 197-98 ("Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms. Religious grounds for resolving public moral disputes would rekindle inter-denominational strife that the Establishment Clause extinguished."); id. at 198 ("Public affairs may no longer be conducted as the strongest faith would dictate. Minority religions gain from the truce not in the sense that their faiths now may be translated into public policy, but in the sense that no faith may be.").

n19 See Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. PA. L. REV. 149 (1991) [hereinafter Smith, Rise and Fall]; Steven D. Smith, Separation and the "Secular": Reconstructing the Disestablishment Decision, 67 TEX. L. REV. 955 (1989) [hereinafter Smith, Separation].

n20 See David M. Smolin, Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry, 76 IOWA L. REV. 1067 (1991) (reviewing PERRY, supra note 17).

n21 See McConnell, Update, supra note 10, at 738-41. McConnell supports less clearly than Smith and Smolin the view that laws may be enacted to advance religious faith, without the need to find any secular analogues for religious values. In addition to the writings I discuss in Part I(C)(2), McConnell has also written that requiring "a secular purpose for all government action" is "right and proper," and that "[t]he absence of a strong secular justification" might be evidence of a program favoring religion. McConnell, supra note 8, at 128, 144.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1616] Two issues are crucial to this debate: whether religious values are different in kind from secular values, and, if so, whether that difference should matter for Establishment Clause analysis. As Sanford Levinson puts the question,

Why doesn't liberal democracy give everyone an equal right, without engaging in any version of epistemic abstinence, to make his or her arguments, subject, obviously, to the prerogative of listeners to reject the arguments should they be unpersuasive (which will be the case, almost by definition, with arguments that are not widely accessible or are otherwise marginal)? n22

Unless religious belief is different from secular belief in a relevant way, we cannot logically exclude religious premises from grounding law unless we wish to exclude secular premises as well.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n22 Sanford Levinson, Religious Language and the Public Square, 105 HARV. L. REV. 2061, 2077 (1992) (reviewing PERRY, supra note 17); see also Stephen L. Carter, Evolutionism, Creationism, and Treating Religion as a Hobby, 1987 DUKE L.J. 977, 995 (discussing possibility of "a liberal politics that would acknowledge and genuinely cherish the religious beliefs that for many Americans provide their fundamental worldview," in part by "meeting policy proposals on their own grounds, rather than dismissing them because of the religious motivations of their supporters").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

1. The Uniqueness of Religion

Three standard efforts to distinguish religious belief from secular belief stress that religion is divisive, that religion relies on a source of authority other than the state, and that religion is not provable. But each of these arguments proves too much; in each case, secular as well as religious belief appears to fit the criterion. n23 There is a fourth criterion, however, that distinguishes the two [*1617] sorts of belief, and that is widely accepted by scholars as providing a coherent definition of "religion." After I describe and defend this criterion, I will show why it should matter for Establishment Clause analysis.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n23 Thus, consider: (1) "Religion is divisive." To be sure, religion often has been divisive, leading to sectarian conflict and persecution. But there

also have been many divisions over political values not considered religious, and many of these divisions also have caused strife. The organized nature of some religions might make it more likely that groups of people will have power to act against dissenters, but there are plenty of organized nonreligious groups that take controversial political positions.

Now, consider: (2) "Religion is based on an authority that competes with civil authority without being accepted by all as an authority." It is true that for many, religion is not merely a choice but a compelling source of authority that one feels obliged to follow. See, e.g., JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 298, 299 (Robert A. Rutland et al. eds., 1973); John H. Garvey, Free Exercise and the Values of Religious Liberty, 18 CONN. L. REV. 779, 791 (1986); Ira C. Lupu, Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution, 18 CONN. L. REV. 739, 778 (1986); McConnell, supra note 5, at 1497; Geoffrey R. Stone, Constitutionally Compelled Exemptions and the Free Exercise Clause, 27 WM. & MARY L. REV. 985, 993 (1986). But it is no less true that many holders of secular beliefs feel equally obligated by the force of those beliefs to obey them, even if their injunction conflicts with that of the state. See MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY 98-106 (1968); Garvey, supra, at 792-97; Marshall, Case Against, supra note 7, at 387.

Finally, consider: (3) "Religion is ultimately based on faith, which is nonprovable." As Michael McConnell has explained, one of the reasons the Framers chose to protect religious and not secular conscience was the notion that religious faith is special because incapable of proof. McConnell, supra note 5, at 1498. Though this notion may have animated the Framers, Kent Greenawalt and Michael Perry devote substantial portions of their books dealing with religion and politics to rebutting the idea. See GREENAWALT, supra note 12, at 63, 65, 146-56; PERRY, supra note 17, at 55, 84, 94-95, 120-21. According to Greenawalt and Perry, we must be radically skeptical of finding provably correct answers, in either the religious or the secular realm. At some point, both religious and secular claims are based on premises accepted as articles of faith. See also DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 76-77 (1986) (summarizing William James's statement of conditions under which it is reasonable to believe something that cannot be proven, and noting that these conditions are "applicable to both secular and nonsecular belief"); Jesse H. Choper, Defining "Religion" in the First Amendment, 1982 U. ILL. L. REV. 579, 604 (1982) (calling it "very difficult, if not impossible, to distinguish transcendental ideologies from those commonly considered to be based on secular premises"); Marshall, Case Against, supra note 7, at 388 (observing that most types of belief and moral values -- not just religious ones -- have "non-rational components," and adding that "the contentions that practical reasoning leads to an understanding of reality and that morality may be understood through rational processes are themselves ultimately based on no more than their own non-rational, a priori assumptions") (footnote omitted); Smith, Separation, supra note 19, at 1008 (noting that "political decisions are inevitably grounded in evaluative judgments," and often "universally shared 'grounds of decision' do not appear to exist").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Although secular as well as religious belief might be divisive, might rely on a nongovernmental source of authority, and might not be provable, only

religious belief involves reference to an extrahuman source of value, of normative authority. n24 To be sure, I am defining "religious belief" in this way; I do not purport to divine a "natural" meaning of "religious belief." But there is reason to think that when most people speak of "religion," they are thinking of some such "reference out," some such reliance on a source of normative authority that is not based solely on human reason or experience. By far the most common criterion mentioned by scholars as definitive of "religion" is a reference beyond human experience to an extrahuman source of value. n25

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n24 By "extrahuman source of value, of normative authority," I mean only those sources of value that go beyond the personal and the communal. References to moral categories derived from reason and human experience (including the experience of the natural world) are, by this definition, intrahuman rather than extrahuman. I understand that for some, religion is just as "human" as any other form of belief; that is, what characterizes their religious belief is not a leap of faith to an extrahuman source of value, but a set of inferences derived from human experience. See, e.g., Carter, supra note 22, at 992-93. Whether the Establishment Clause prohibits express political reliance on such "intrahuman" religious belief, and accordingly whether the Free Exercise Clause provides exemptions for such believers, are difficult questions that I do not address here. Cf. text accompanying notes 25-28. For purposes of the analysis in this Article, because I am using a commonly accepted definition of religion and am not seeking to prove that this definition exhausts the category "religion," it seems safe to agree with Kent Greenawalt that although some claim their religious convictions are intra-rather than extrahuman, most religious belief rests on "elements that are not subject to reasoned interpersonal evaluation." Kent Greenawalt, Religious Convictions and Political Choice: Some Further Thoughts, 39 DEPAUL L. REV. 1019, 1032 (1990).

n25 See, e.g., PERRY, supra note 17, at 70-72 (saying that religion involves "[a] set of beliefs about how one is or can be bound or connected to the world -- to the 'other' and to 'nature' -- and, above all, to Ultimate Reality," and that this Ultimate Reality is "beyond all thought and speech"); George C. Freeman III, The Misguided Search for the Constitutional Definition of "Religion," 71 GEO. L.J. 1519, 1520 (1983) (arguing that founders equated religion with theism); Garvey, supra note 23, at 792-97, 798-801; Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671, 678 (1992) ("Religious belief in the Western tradition centers on a transcendent force or belief -- that is, a force or belief beyond the material, phenomenal world."); Kent Greenawalt, Religion as a Concept in Constitutional Law, 72 CAL. L. REV. 753, 805 (1984) (asserting that the "most plausible single-factor approach to religion is one that is based on 'higher reality' in some broad sense"); Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233, 240, 285-86 (1989) (identifying key to religion as "the role that a sacred or transcendental reality plays in imposing obligations upon the religious faithful," and asserting that "[a]lthough not necessarily bound by any theistic precept, religious duties must be based in the 'otherworldly' or the transcendent"); Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L. REV. 993, 1002 (1990) ("[A]ny belief about God, the supernatural, or the transcendent, is a religious belief."); McConnell, supra note 5, at 1493 & n.430 (describing Madison's view of religion as retaining a "distinction between transcendent authority and personal judgment," and arguing that "[t]he historical materials uniformly equate

'religion' with belief in God or in gods, though this can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms"); McConnell, supra note 8, at 172-73 ("The essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole."); Mark Tushnet, The Limits of the Involvement of Religion in the Body Politic, in THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 191, 195 (James E. Wood, Jr. & Derek Davis eds., 1991) ("A 'secular ground' (or 'secular reason') is one that does not make essential reference to a deity; a religious ground or reason does."); John H. Yoder, Response of an Amateur Historian and a Religious Citizen, 7 J.L. & RELIGION 415, 418 (1989) ("From within the faith story . . . the concern is not with religion, as a set of human practices, but with God, whom these practices seek to honor."); id. at 423 ("[I]t is inadequate to try to manage free exercise and establishment issues by excising from the picture the concept of divine will which historically made them become issues in the first place.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1618] One might object at the outset that the very act of defining "religion" raises Establishment Clause problems, for there are some people who deem their beliefs "religious" regardless of whether those beliefs would commonly be considered religious or whether those beliefs refer to an extrahuman source of value. n26 On this view, any definition of "religion" for First Amendment purposes that excludes what some consider to be "religion" improperly discriminates among religions. An initial and obvious problem with this position is that the religion clauses use the word "religion" and say that it may not be established and that its free exercise may not be prohibited. Barring interpretation of the term "religion" risks negating the Establishment and Free Exercise Clauses as barriers to governmental action, for we would have no way of knowing when such action is legitimate and when it is not. In assessing the argument that each citizen should be the judge of whether her beliefs are "religious," consider how odd it would be to say that each individual claimant could decide whether her behavior is "speech" under the Freedom of Speech Clause, or whether her compensation is "just" under the Takings Clause.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n26 See Welsh v. United States, 398 U.S. 333, 356-61 (1970) (Harlan, J., concurring in result) (arguing that legislation recognizing only theistic religious belief as basis for statutory exemption from military draft violates Establishment Clause because not "neutral"); Marshall, Defense, supra note 7, at 310-11, 319-23; Jonathan Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 YALE L.J. 593, 604 (1964) ("[A]n attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the 'establishment' clause, as excluding some religions, or even as establishing a notion respecting religion."). For other arguments against defining "religion," though not necessarily because such definition itself violates the Establishment Clause, see Freeman, supra note 25, at 1565 ("There simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else."); Greenawalt, supra note 25, at 762 ("[F]or constitutional purposes, religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

But I do not wish to argue that the coverage of the religion clauses is exhausted by beliefs that refer to extrahuman sources of value. For example, there might be reasons to invoke the Establishment Clause if a group that looks, talks, and sounds like a traditional religion seeks government funding for worship services, even if the object of the group's worship is not [*1619] extrahuman. Furthermore, direct regulation of beliefs or practices or association of such a group might be thought to violate the Free Exercise Clause. In short, although I claim that the Establishment Clause prohibits enacting religious faith into law and thus provides the predicate for Free Exercise Clause exemptions for adherents to such faith, I do not claim that this calculus exhausts the jurisprudence of either of the religion clauses. My goal here is the narrower one of examining whether the Constitution ever requires exemptions from otherwise valid law for claims of conscience; my contention is that such exemptions are required only when arguments on behalf of those claims are not allowed as the ground of law, and that only references to an extrahuman source of value should be so excluded. n27

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n27 But see the caveat to this conclusion in Part II(D).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

2. Why Religion's Uniqueness Matters

Basing law on an express reference to an extrahuman source of value should matter for Establishment Clause analysis because such reference effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process. Consider a law based on the maxim "you should love your neighbor as you love yourself" -- a law enacting some form of Good Samaritan obligation, say. The legislature's reliance on that maxim might be based on express reference to facts about human behavior and conclusions reached about the causes and effects of such behavior. In that case, the law would not be based on a source of value beyond human experience. Although it might be hard or impossible to "prove" these conclusions and to "show" why they should lead to a particular law, at least the door is left open for dissenters to seek to alter the law based on arguments accessible to all involved. In this sense, reference to human experience can be seen as the common denominator for political debate. If, on the other hand, the Good Samaritan law were based expressly on the ground that God (or, more generally, and source of value beyond human experience) commands us to love our neighbors as ourselves, n28 then dissenters are left with the options of (a) converting to the relevant faith and thus gaining access to the source of values animating the law, (b) arguing with the religious believers about whether they have properly construed the commandments of their faith, or (c) persuading those believers that their faith is "false." Unless they come to share the faith, dissenters cannot meaningfully compete in the debate over how conclusions from religious faith should be enacted into law.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n28 See Luke 10:25-37.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In other words, although secular as well as religious beliefs might not be provable, there is nonetheless a significant difference between expressly grounding law in premises accessible to citizens as citizens, on the one hand, [*1620] and only to those with a particular religious faith, on the other hand. It might be hard to show that some person or group should be considered "trustworthy," n29 for example, but we still go about doing so by breaking down the meaning of that term and amassing evidence based on human experience, which we have in common as citizens. Even nonrational secular premises, although perhaps not strictly provable, at least operate through reference inward rather than outward. Basing law expressly on religious faith, on the other hand, involves pointing toward a source of value that people can share not as United States citizens, but only as citizens in the kingdom of the same God. When religious believers enact laws for the express purpose of advancing the values believed to be commanded by their religion, they exclude nonbelievers from meaningful participation in political discourse and from meaningful access to the source of normative authority predicating law. n30 They force their "reference out" on others, disempowering nonbelievers. For this reason, it is proper to insist that law be grounded expressly in sources of value accessible to citizens as citizens, not merely to those citizens who happen to share a faith in a separate, extrahuman source of authority. n31

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n29 Cf. GREENAWALT, supra note 12, at 63; RICHARDS, supra note 23, at 76.

n30 See GREENAWALT, supra note 12, at 216-17; see also Greenawalt, supra note 24, at 1031 ("There is . . . no interpersonal way in which the weight of personal experience is to be assessed. If a law were based largely on religious beliefs that were mainly confirmed by personal experiences, those who had not shared in the experience might understand why the law had been adopted, but to them, there would be no reasoned basis on which they would be able to conclude that the law was sound."); id. at 1035 ("If political argument were comprised largely of debate about the meaning of particular biblical passages, those who did not believe in the same kind of authoritativeness for biblical passages would be bound to feel excluded.").

n31 See Ingber, supra note 25, at 285 ("The obligations imposed by religion are of a different, higher nature than those derived from human relationships; they are not part of the agenda of public debate."); cf. Frederick Schauer, May Officials Think Religiously?, 27 WM. & MARY L. REV. 1075, 1077 (1986) ("Perhaps implicit in the idea of a liberal democracy . . . is an obligation of . . . an official to rely on reasons not that necessarily are held by all of the people, but that could be held by all of the people. Religious argument, to the extent that it intrinsically appeals to and includes those who share common religious presuppositions while simultaneously excluding those who do not subscribe to certain religious tenets, may very well fail this test. Religious argument may ultimately require addressees of the argument either to disagree or to give up their religious faith, in a way that secular argument in the realm of the nonrational does not. Religious decisionmaking by an official, therefore, may be of a different order than other forms of choosing between courses of action, even on nonrational grounds, and for that reason religious decisionmaking may be inconsistent with the obligations of an official in a liberal democracy.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Some scholars have suggested that a law should withstand Establishment Clause challenge if a plausible secular purpose can be articulated on its behalf. n32 Thus, laws requiring school prayer would be held to violate the Establishment Clause because their only plausible purpose is religious, while laws banning abortion would never violate that clause -- regardless of the reasons actually advanced in support of the laws. The argument that a law with a plausible secular purpose should be upheld is often packaged with the [*1621] argument that individual citizens must be able to rely on their religious values in forming political views. n33 People taking this position stress that so long as a law has a plausible secular purpose, it can be accepted even by those who don't share the relevant religious faith, while the religious believers can still rely in the political process on the religious values that they hold most dear.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n32 The reasons advanced for this test vary considerably. Thus, while Steven Smith urges the test as part of an argument to permit religiously backed law, see Smith, Separation, supra note 19, at 1004-05, Kathleen Sullivan -- who builds a case against religiously backed law -- urges the test to avoid the perils of inquiry into legislative motivation, see Sullivan, supra note 6, at 197 n.9.

n33 See, e.g., Tushnet, supra note 25, at 195, 203.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

I believe this argument to be an important mistake. I have no quarrel with citizens and legislators relying on their religious beliefs when they form political positions or when they decide how to vote (for laws or for representatives). The problem arises when the legislature appears to be captured by adherents to a particular religious faith -- more specifically, when a law appears to have been passed because of a sectarian religious concern. n34 Even those who argue for sustaining legislation with a plausible secular purpose would agree that a religious sect (I use the term broadly) may not require all citizens to engage in a religious practice that is specific to that sect. A Jewish majority in a town, for instance, cannot require that all citizens light Sabbath candles on Friday night. In my view, it is just as problematic for adherents to a religious faith to forbid abortions, say, if they make clear in the relevant political fora that their reason for enacting the ban is their belief that God condemns abortion. n35 A nonbeliever is effectively denied participation in the political process because the nonbeliever cannot discuss the matter on the terms that the religious believers have set; the nonbeliever has no (current) access to those terms, no way of evaluating an argument made on expressly religious terms. For the same reason, however, I see no problem if the religious believers are willing to translate their religious source of value into secular terms, because then the nonbeliever perceives that she can participate in the debate. n36

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n34 See Greenawalt, supra note 24, at 1022 (arguing that legislators can rely on religious sources in forming their judgments, but that "[c]ivility and

respect for minorities counsel that public advocacy be conducted in the nonreligious language of shared premises and modes of reasoning").

n35 Cf. Webster v. Reproductive Health Servs., 492 U.S. 490, 565-72 (1989) (Stevens, J., concurring in part and dissenting in part); John Paul Stevens, The Bill of Rights: A Century of Progress, 59 U. CHI. L. REV. 13, 30-33 (1992). In discussing Roe v. Wade, 410 U.S. 113 (1973), Laurence Tribe once suggested that the Establishment Clause should be read to invalidate legislation when "the involvement of religious groups in the political process surrounding a subject of governmental control is convincingly traceable, as it is in the case of abortion, to an intrinsic aspect of the subject itself in the intellectual and social history of the period." Laurence H. Tribe, The Supreme Court, 1972 Term -- Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 HARV. L. REV. 1, 25 (1973) (footnote omitted). Tribe has since changed his mind, stating that his prior view "appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1350 (2d ed. 1988) (footnotes omitted); see also id. at 1211 (criticizing strict secular-purpose requirement).

n36 Michael McConnell has made a strong argument that the "no endorsement of religion" test now fashionable among some on the Court is not a workable Establishment Clause test. See McConnell, supra note 8, at 147-57. But to the extent that the test is helpful, it is because "endorsement of religion" is precisely what happens when a legislative majority relies expressly on its religious faith to ground law. Conversely, one might argue that certain laws are legitimate even though originally based on enacting faith into law, because now most people understand the law's dominant purpose to be secular. In these cases, the original religious purpose becomes embedded, as it were, in the long-standing practice, and the secular purpose rises to dominance. See Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. & MARY L. REV. 997, 1004 (1986). This is how one can justify McGowan v. Maryland, 366 U.S. 420 (1961), in which the Court upheld laws requiring businesses to be closed on Sunday. Central to upholding state action in this category is that the practice at issue be generally perceived today as secular rather than religious. So although Michael McConnell might be correct to state that the pretty lights on Michigan Avenue in Chicago have religious significance, that "most of us do not recognize the symbolism" is the more important observation. See McConnell, supra note 8, at 189.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1622] Imagine, for example, legislators arguing for the banning of abortions "because they're immoral." If pressed in debate, assume that the legislators explain that they (a) have observed human suffering, (b) distinguish human beings from animals because of the language abilities of the former, (c) are concerned about slippery slopes, and (d) resolve close questions in favor of preserving life. That sort of response is quite different from the response of legislators who say, "We believe in Christ as Lord, and His scriptures say that life is sacred, and therefore abortion is wrong." Nonbelievers can have a dialogue with the former legislators based on sharable observations and conclusions about human experience; with the latter legislators, a nonbeliever

might reasonably feel muted by the reference to the legislators' God and the claim of authority based in an extrahuman power.

Take another example: Suppose Person A says that the oil companies run the United States and that therefore we should enact law X. Although Person A's premise might appear not based in reason, we can at least try to get to the bottom of it by examining standard sources of information about the influence of oil companies. Now suppose Person B says that Christ is God and taught Y and that therefore we should enact law Z. Nonbelievers can't try to "get to the bottom of it"; precisely because they are not believers, the premise is not currently available to them for evaluation.

Requiring that laws have an express secular purpose rather than merely a plausible one might transform the legislative process in a way consistent with the dictates of the Establishment Clause. n37 In some cases, the same laws will be passed that otherwise would have been passed, but pursuant to secular rather than religious argument. n38 In other cases, the unavailability of a strong secular argument will mean that a law will not be passed. This transformation of the legislative process will eliminate the Establishment Clause injury of excluding nonbelievers from meaningful participation in the political process. That we see so many laws passed on the basis of secular argumentation, when religious arguments no doubt are stronger in the souls and minds of many [*1623] legislators, is testament not to the fact that the Establishment Clause proscription on enacting faith into law will have little real-world effect, but rather to the fact that it is already having such an effect.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n37 Cf. John H. Mansfield, The Religion Clauses of the First Amendment and the Philosophy of the Constitution, 72 CAL. L. REV. 847, 894-95 (1984).

n38 This is similar to the administrative-law doctrine requiring remand to an agency if it relied upon an improper reason, but permitting the agency to reach the same substantive result on different grounds. See SEC v. Chenery Corp., 318 U.S. 80 (1943).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Let me explain why I have not suggested forbidding laws based on an underlying religious purpose as well as those based on an expressly religious purpose. One can imagine four different situations: (1) a law is religious on its face; (2) a law not facially religious is enacted for an expressly religious purpose; (3) a law not facially religious is enacted for an expressly secular purpose that appears to be a pretext for the real purpose, which is religious; and (4) a law not facially religious is enacted for an expressly secular purpose that does not appear pretextual, but the real underlying purpose is religious. The first three types of law should be invalid under the Establishment Clause because they foreclose meaningful political participation by nonbelievers. All three laws are, in the terminology I am using in this Article, "expressly" religious. But if religious believers can translate their "true" religious reasons successfully enough to make it appear to nonbelievers that the secular reasons are the real ones, then from the nonbelievers' perspective, their political participation is meaningful. One might argue that to be consistent, I should condemn even type (4) laws in principle and then acknowledge that the judiciary can't enforce this condemnation because the true reasons behind the

laws will be inaccessible to it. But my Establishment Clause argument does not condemn type (4) laws. It turns not on the underlying reasons for laws, but rather on the reasons that are apparent in the political process. Invalidating type (3) laws will cover all instances in which believers think they have successfully masked their true reasons, but have not. If a religious reason can be successfully translated into a secular one -- if a nonbeliever sees the secular argument as one made in good faith, and finds the ensuing debate meaningful -- then the concern with exclusion from political participation is eliminated.

We can now return to Sanford Levinson's question: In a liberal democracy, why aren't all arguments valid in political debate, subject to the possibility that listeners will reject them (which is likely to occur if the arguments aren't widely accessible)? The position implicit in this question reflects a misunderstanding of the role of religion in political debate. Religious arguments cannot simply be "rejected" by those who don't share the faith of the people making the arguments. As a non-Christian, I can't meaningfully debate with a Christian whether certain values do or do not stem from her faith in Jesus Christ. The model of political debate implicit in Levinson's question fails to address debates that are dominated by an expressly religious position. In such instances, nonbelievers are not equal participants in the lawmaking process, for they lack access to the source of normative authority that is offered as the basis for the law they are told to obey.

[*1624] 3. The Dominant Express Purpose Test and the Court's Jurisprudence

Many laws will be expressly based not on a single religious or secular purpose but on an intertwined set of purposes, some religious and some secular. This is inevitable in a society in which most citizens claim to be religious. Merely showing that a law was expressly based in part on religious faith cannot be sufficient to invalidate that law if we accept the fact that many people are religious and reach conclusions about many issues from religious premises. But accepting the presence of expressly religious purposes for law does not require accepting laws that are dominantly based on express references to religious faith. There is a point at which the mere acknowledgment of the religious values held by many citizens slips into the establishment of those values as the basis of law. That is the line that a legislature may not cross. Thus, I would put the test this way: For a law to be upheld against an Establishment Clause challenge, the law's dominant express purpose must be secular, and any expressly religious purpose for the law must be no more than ancillary and not itself dominant. n39

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n39 For other formulations, see Edwards v. Aguillard, 482 U.S. 578, 590-91 (1987) (finding legislation invalid if backed by "preeminent religious purpose"); id. at 599 (Powell, J., concurring) (observing that "religious purpose must predominate" for legislation to be invalid).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court has followed this test, though without stating it clearly and certainly without explaining which characteristics of "religion" forbid religious values from being enacted into law. In Epperson v. Arkansas, n40 which struck down an Arkansas law forbidding the teaching of evolution in

public school, the Court examined the historical context of the law's enactment and concluded, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." n41 In Stone v. Graham, n42 the Court summarily invalidated a Kentucky law requiring the posting of the Ten Commandments on the wall of each public classroom. The legislature had required a notation on each posting that stated, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." n43 The Court dismissed this notation as pretextual, concluding that the "pre-eminent purpose for [the law] is plainly religious in nature." n44 Likewise, in Wallace v. Jaffree, n45 the Court struck down an Alabama law authorizing a period of silence for "meditation or voluntary prayer" because it "had no secular purpose"; n46 as in Epperson, the Court supported this conclusion with [*1625] references to the context of the law's enactment, and in particular to the legislative history. Finally, in Edwards v. Aguillard, n47 the Court invalidated a Louisiana statute forbidding the teaching of evolution in public school unless accompanied by the teaching of "creation science." Again after examining the history of the law's enactment, the Court dismissed the proffered secular justification of promoting "academic freedom" as pretextual, concluding that the legislature's "preeminent" purpose was religious. n48

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n40 393 U.S. 97 (1968).

n41 Id. at 107-08.

n42 449 U.S. 39 (1980) (per curiam).

n43 Id. at 41.

n44 Id.

n45 472 U.S. 38 (1985).

n46 Id. at 56.

n47 482 U.S. 578 (1987).

n48 Id. at 590-91.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. Accommodation of Religion

Many laws that appear to advance religion -- laws exempting religious believers from otherwise valid law, for example, or distributing public funds to religious as well as public institutions -- are defended as mere accommodations of religious practice. In thinking about how to resolve the "accommodation" dilemma under the Establishment Clause, we should focus on whether the legislature sought expressly to enact faith into law.

Let me begin with the category of nonmandatory legislative exemptions for religious believers -- that is, exemptions that legislatures enact but that courts would not have required under the Free Exercise Clause, even before

Smith. Such exemptions -- say, from the military draft or from laws against ingesting peyote -- would violate the Establishment Clause if their express purpose were religious. Indeed, some commentators have argued that such exemptions necessarily reveal a religious purpose and hence violate the Establishment Clause. n49

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n49 See Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in the judgment), departing from Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting); Steven G. Gey, Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. PITT. L. REV. 75, 180-85 (1990); Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. REV. 1, 27 (1961); Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. PA. L. REV. 555, 560 (1991); Smith, Separation, supra note 19, at 991.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This argument should be rejected. n50 A legislative exemption for religion is not necessarily an affirmation of the truth of the religious faith involved. Rather, the exemption might be based on the secular ground of respect for the dilemma that would be faced by certain members of the community were they forced to choose between obeying the commands of law and obeying those of a separate font of authority. In short, the exemption might be enacted not [*1626] because of religious faith but because of toleration for a belief that happens to be based in faith.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n50 See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Thomas v. Review Bd., 450 U.S. 707, 726-27 (1981) (Rehnquist, J., dissenting); Welsh, 398 U.S. at 369 (White, J., dissenting); Sherbert, 374 U.S. at 415-16 (Stewart, J., concurring in result); McConnell, Update, supra note 10, at 688, 717; Jonathan E. Nuechterlein, Note, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 YALE L.J. 1127 (1990).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Thus, I am somewhat perplexed that despite his analysis elsewhere supporting this position, Michael McConnell suggests in a recent article that accommodation of a religious practice through a legislative exemption "serves no 'secular' purpose," manifests a "religious reason," and may even be comparable to the anti-evolution law at issue in Epperson v. Arkansas. n51 Although McConnell still favors permitting nonmandatory legislative exemptions, I don't see how this position (with which I agree) is advanced by claiming that the exemptions serve a religious rather than a secular purpose. Surely the religious purpose that the Epperson Court found troubling -- the legislature's obvious desire to enact law reflecting the fundamentalist Christian belief that human beings did not evolve from apes -- is different from the legislative purpose in the standard toleration-exemption case, in which the legislature accommodates a religious group out of respect for its faith rather than because the legislature is convinced that the faith is true. To claim that toleration exemptions in

fact reflect a religious rather than secular purpose seems to me an unhelpful use of the term "religious."

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n51 McConnell, supra note 8, at 128-31 & n.83.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

If Smith were overruled or limited, courts would be back in the business of weighing governmental interest against individual interest to decide whether to compel religious exemptions from otherwise valid laws under the Free Exercise Clause. This balancing analysis might resemble the sort of analysis that a legislature considering toleration exemptions would conduct, but legislative exemptions might still be permissible even when a court would not require them under the Free Exercise Clause. For one thing, courts often defer to legislative judgment in striking such balances, in part because legislatures hold an advantage over courts in assessing the strength of governmental interests. In addition, while the legislature may not give a governmental interest more weight than a court would, it may give that interest less weight than a court would. To be sure, there might be some cases in which granting an exemption would be such a heavy and disproportionate burden on the governmental interest in universal obedience to a particular law that the argument that the legislature was merely acting out of respect for certain members of the community might appear pretextual, revealing an illegitimate purpose to advance religious faith. But to say as a categorical matter that legislative exemptions not compelled by the Free Exercise Clause reflect such a purpose is to neglect the distinction between toleration and religious purpose. n52

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n52 In this paragraph, I agree with Michael McConnell, see Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 31; McConnell, Update, supra note 10, at 709-12, and disagree with Jonathan Nuechterlein, see Nuechterlein, supra note 50, at 1128-29, 1143.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1627] The accommodation issue is not confined to the exemption cases. Legislatures often seek to benefit a particular secular interest and include religious institutions as direct or indirect beneficiaries. In Everson v. Board of Education, n53 for example, the Court upheld a statute authorizing school districts to expend funds for sending children to school on public buses, whether the children went to public schools or to nonprofit private schools and whether the private schools were secular or religious. Likewise, in Walz v. Tax Commission n54 the Court permitted a state to authorize property-tax exemptions to nonprofit institutions generally, including churches. In both Everson and Walz, there was no indication that the program was enacted to advance the tenets of a particular religious faith. Rather, these cases involved general legislative programs that were not related to religion, but that included religious institutions incidentally because those institutions shared a relevant nonreligious attribute with secular institutions. I do not discuss here whether and when the mere effect of benefiting a religious institution should be held to violate the Establishment Clause. My point is simply that the core Establishment Clause prohibition on enacting faith into law is not violated in

these cases. n55

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n53 330 U.S. 1 (1947).

n54 397 U.S. 664 (1970).

n55 Cf. id. at 696 (Harlan, J., concurring); Greenawalt, supra note 25, at 795; Mansfield, supra note 37, at 878; McConnell, supra note 52, at 14-15; Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 SUP. CT. REV. 373, 395; Weiss, supra note 26, at 617. But see Sullivan, supra note 6, at 208-14.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

C. Objections to Forbidding Laws from Having a Dominant Express Religious Purpose

Here, I respond to the following claims: (1) that the inquiry I advocate improperly chills legislators' expression; (2) that we can distinguish laws prescribing religious practices from those dealing with secular subject matter; (3) that the Establishment Clause does not limit the values that may be used to ground law, but requires only institutional separation between government and religion; (4) that forbidding the enactment of religious faith into law implies that the offered faith is false, which is itself a religious position; and (5) that barring religious values as grounds for law improperly disadvantages religion.

1. Inquiry into Legislative Purpose Improperly Chills Legislators' Expression.

Steven Smith, who opposes the secularization of law, argues that overturning laws because the legislators who enacted them expressed religious [*1628] purposes "raises a potentially serious threat to the freedom of expression of legislators who hold religious beliefs." n56 Kathleen Sullivan, who supports the secularization of law, similarly contends that "an articulable secular rationale is all that is required; a requirement of secular motivation trenches too far on the freedoms of conscience and expression of citizens and legislators." n57 Both Smith and Sullivan appear concerned that an Establishment Clause jurisprudence that uses legislative statements as evidence of impermissible purpose will deter legislators from speaking their minds and perhaps induce them to alter their beliefs, thus infringing upon freedom of expression and religion.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n56 Smith, Separation, supra note 19, at 994.

n57 Sullivan, supra note 6, at 197 n.9.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

These concerns are misdirected. When we use statements as evidence of illegitimate legislative purpose, we are not punishing the speaker for the beliefs or opinions she holds. Rather, we are using the statements in a

merely evidentiary fashion. The speaker can believe or speak whatever she wants without fear of punishment. If she explicitly attempts to turn her beliefs into law that will bind her fellow citizens, however, she has gone beyond mere belief or expression.

This analysis is similar to the argument supporting the use of, say, an employer's racist statements as evidence in a job-discrimination case. An employer is entitled to believe whatever she wants about the race of her employees, and with some exceptions she also is entitled to say whatever she wants about their race. n58 But if she fires a black employee and the employee brings a race-discrimination suit, the employee may introduce into evidence statements made by the employer that indicate racial bias. The law that gives the employee a cause of action doesn't restrict the employer's beliefs or expression, but only the action of firing the employee illegitimately. n59 Similarly, a rule forbidding laws expressly based on religious faith doesn't forbid adherence to that faith; it just forbids advancing that faith as the reason for law. If this forces legislators to refrain from advocating a religious purpose for legislation and to find a secular analogue for that purpose -- both of which involve masking a reason for which they believe the law should be [*1629] passed -- then the Establishment Clause value of preventing the passage of law expressly based on values available only to some citizens will have been advanced. n60

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n58 Some lawsuits charging workplace harassment do rely directly on speech. Although the Court in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992), said without serious analysis that such harassment actions do not run afoul of the free-speech guarantee against content-based laws, there is a substantial question whether verbal-harassment actions based on statutes that single out certain attributes for protection (such as race or gender) are consistent with the reasoning in R.A.V.

n59 It is precisely this evidentiary use of speech that distinguishes the type of hate-speech statute invalidated by the Court in R.A.V. from the type of hate-crimes statute improperly invalidated by the Wisconsin Supreme Court in State v. Mitchell, 485 N.W.2d 807 (Wis.), cert. granted, 113 S. Ct. 810 (1992). Hate-speech laws punish speech directly for its hateful quality; a statement about the race of the addressee is punished because of the harm that the statement itself causes. Wisconsin's hate-crimes law, by contrast, stepped up punishments for crimes when the victim was selected on the basis of race (or other specified characteristics); a statement about the victim's race would be used simply as evidence that the defendant selected the victim because of her race.

n60 Cf. Schauer, supra note 31, at 1075-76 (observing that Establishment Clause might be read to forbid government officials from doing things as officials that they might be permitted to do as citizens, because officials have "positional duties" that require them to rely on secular rather than religious reasons in carrying out their obligations).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

2. We Can Distinguish Laws Prescribing Religious Practices from Those Dealing with Secular Subject Matter.

The argument for upholding laws that have a plausible secular purpose rather than insisting upon an express secular purpose can be recast as an argument for invalidating only laws that address inherently religious subjects. Thus, a law requiring the wearing of a cross would be invalid while a law banning abortion would not, regardless of the reasons advanced in support of such laws; there is no plausible secular purpose for the former law, while there are plausible secular purposes for the latter law. This argument proceeds from the premise that the central purpose of the religion clauses is to protect religious liberty and to avoid government coercion of religion. As Michael McConnell puts it, "[T]he government may not interfere with a person's chosen religious belief and practice by prohibiting it or by exerting power or influence in favor of any faith." n61 So long as the content of a law is not inherently religious, the argument goes, no religious coercion has taken place, even if the majority that approved the law was persuaded by a religious argument.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n61 McConnell, supra note 52, at 1; see also McConnell, Update, supra note 10, at 690 (noting that religion clauses protect against "two equal and opposite threats to religious freedom -- government action that promotes the majority's favored brand of religion and government action that impedes religious practices not favored by the majority"); McConnell, supra note 8, at 117 ("[T]he purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or hindering religion."); id. at 136 ("The overriding objective of the Religion Clauses was to render the new federal government irrelevant to the religious lives of the people."); id. at 169 (defining appropriate judicial inquiry as: "[I]s the purpose or probable effect to increase religious uniformity, either by inhibiting religious practice . . . or by forcing or inducing a contrary religious practice . . . , without sufficient justification? The baseline for these judgments is the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

But religious arguments for otherwise secular laws risk rendering religious both the debate over those laws and their social meaning. When a religious person argues that abortion should be banned because that is God's will, abortion is no longer secular for her or for those who engage her on her religious terms. Its existence -- and its proposed nonexistence -- have been transmuted into something religious. If an anti-abortion bill is advanced for the express purpose of enacting a value believed to be commanded by religion, then abortion is a religious matter for the legislators who rely on the religious [*1630] argument and might therefore become a religious matter for those seeking to defeat the bill. Furthermore, if the bill is enacted pursuant to the religious arguments, then the legal obligations imposed by the new law become endowed with religious significance. As a result, imposing legal duties based expressly on the dictates of a religious faith does amount to "exerting power or influence in favor of [that] faith." n62

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n62 Also, as Ira Lupu has explained, coercion does not exhaust the content of the Establishment Clause, which protects not only against laws that coerce

citizens to follow a particular religion but also against laws that deliberately support some religions and not others. See Lupu, supra note 49, at 576-80. This value of "equal religious liberty," as Lupu calls it, see id. at 567, is endangered by legislation that is expressly based on the commands of a particular religious faith.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

3. The Establishment Clause Does Not Limit the Values that May Be Used to Ground Law, but Requires Only Institutional Separation Between Government and Religion.

Others have maintained that the Establishment Clause was intended only to ensure separation between government and religious institutions, and that enacting law on the basis of religious faith does not threaten institutional separation. n63 But these categories collapse. Laws advancing faith tend -- albeit insidiously, slowly, and incrementally -- to establish government as a religious institution. n64 In other words, there is more than one way to establish a church. Funneling religious faith into a pattern of legal obligations and rights would, in the extreme case in which all aspects of the faith were turned into law, convert the state into the church. Of course we all agree that the government may not require worship, prayer, and the like. But partial establishment should be just as forbidden as complete establishment. When legislation is expressly based on religious arguments, the legislation takes on a religious character, to the frustration of those who don't share the relevant religious faith and who therefore lack access to the normative predicate behind the law. In short, to ensure that law is part of the civil government and not the church establishment, it is crucial that the express purposes for law be secular rather than religious.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n63 See Smith, Separation, supra note 19; Smith, Rise and Fall, supra note 19; Smolin, supra note 20.

n64 Steven Smith, the primary proponent of the view that the Establishment Clause requires only institutional separation, describes the argument against his view fairly well, without (to my view) sufficiently rebutting it. See Smith, Rise and Fall, supra note 19, at 184 ("[I]f government relies upon religious beliefs in formulating public policies, the resulting policies require conformity to what some citizens may regard as religious programs or agendas. . . . Such compulsion can be viewed as imposing, at least in one important matter, a kind of compelled religion, and thus as violating the commitment to religious freedom.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1631] 4. Forbidding the Enactment of Religious Faith into Law Implies that the Offered Faith Is False, Which Is Itself a Religious Position.

One might argue that all sides in a political debate in which religious values are raised necessarily take a position on the truth of those values and hence of that religion, and that therefore it is impossible to carve the legislative world into religious and secular purposes. According to this argument, if a legislator is apprised of the claim of religious truth

animating a particular bill, and if the legislator votes against the bill, the legislator will have taken the position that the religious claim is false. This position, too, is religious, or so the argument goes.

I have two responses. First, the idea that rejection of a political argument based on a claim of religious truth necessarily implies rejection of that claim of truth is relevant only when the claim of religious truth is made known to the nonbelievers; I have already explained why such a claim should not be part of public political discussion to begin with. Second, it is not true that voting against a bill backed by a claim of religious faith necessarily involves taking a position on the truth of that religion. Merely being aware that a position is inconsistent with a particular claim of religious truth doesn't make that position itself religious, just as being aware that there is a secular analogue to a religious claim doesn't make that claim secular. In other words, after rational discourse, when the opponent of a bill proffered from religious faith is made aware that her position is consonant with a particular religious position (i.e., the denial of the truth of that faith), she might still justify her vote with secular arguments, not because she denies the truth of the religious faith. That she is aware of a consistency between her position and a religious position does not necessarily mean that she votes the way she does because of the religious position or that she expresses her position in religious terms. So, although David Smolin might be correct in stating that "government officials cannot act without reliance on implicit moral and factual assumptions that derive from various competing religious views," n65 "implicit" and "derive from" are not the same as "explicit" and "are expressly meant to advance." Legislative action for the express purpose of either advancing or denying a claim of religious truth is different from legislative action for the express purpose of advancing or denying a claim that is considered secular.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n65 Smolin, supra note 20, at 1091.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

What about the legislator who does vote a certain way in order to deny a claim of religious truth? "If the establishment clause is understood as barring government from sponsoring claims of truth in the domain of religion," Kent Greenawalt suggests, "then antireligious ideas may be understood as a subset of religious ideas." n66 But we must be careful to distinguish between [*1632] Establishment Clause and Free Exercise Clause concerns. It certainly would violate the Free Exercise Clause for a legislature to harm religion directly by seeking to deny a claim of religious truth -- say, by banning religious worship services. Yet banning religious worship services would violate the Free Exercise Clause regardless of why the legislature chose to do so. The Establishment Clause is relevant as a distinct source of limitation on government because it prohibits the use of legislation to impose obligations based expressly on the affirmation of an extrahuman source of values. The relevant question here is whether a predicate such as "God doesn't exist" could itself be the source of values animating the passage of law. But except when considering a bill that would directly harm religion (which is covered under the Free Exercise Clause), it would be odd for legislators to say: "God doesn't exist, and so we're going to enact the following law." Presumably a law that denies certain religious truths would also accept other values as true, and presumably the dominant express purpose of such a law would be the advancement

of those other values rather than the mere denial of the religious ones.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n66 Greenawalt, supra note 25, at 793 (footnotes omitted). Ned Foley has written to me in a similar vein that perhaps the Establishment Clause "should be understood as precluding the government's reliance on any beliefs that lie on the plane of theology."

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For example, say the federal government enacted a military draft and in doing so expressly denied that any extrahuman source of value prohibits all killing. Such a denial, though it might be an aspect of legislative purpose, could not logically be the dominant express purpose for the draft law. Instead, the dominant express purpose of the draft law presumably would involve secular arguments about the need to provide a national defense, and such arguments are not themselves "claims of truth in the domain of religion." The imposition of legal obligations stems from the acceptance of a source of value, not from the mere denial that another source of value (extrahuman or not) exists.

5. Barring Religious Values as Grounds for Law Improperly Disadvantages Religion.

Finally, a religious person might object that barring her values from being enacted into law improperly excludes her from full participation in politics, for she might derive normative authority solely from her religious faith. The religious person might accept the requirement of finding a secular analogue for her religious values, if doing so permits law to coincide with what she deems the correct values. But if she considers this requirement a restriction on her political participation, then we must recognize that whether we permit or forbid religious values to ground law, someone will be excluded from full political participation: either the secular person, because she lacks access to the faith [*1633] enacted into law, or the religious person, because her faith has been cordoned off. In either case, it would be appropriate to offset this exclusion by requiring exemptions from law. Strictly speaking, we could try to run a system in which law could be used to advance religious faith, and in which those who do not share that faith could receive exemptions. But this approach seems odd in a nation that forbids government from making any law respecting an establishment of religion. It is more consistent with the Establishment Clause -- and it allows us to give full meaning to the Free Exercise Clause, as I discuss in Part II -- to bar religion from grounding law but to require exemptions for those whose religions forbid obedience to such law.

II. FREE EXERCISE CLAUSE EXEMPTIONS AS A POLITICAL COUNTERWEIGHT TO ESTABLISHMENT CLAUSE DISABILITIES

The Smith position against exemptions implicitly treats religious values as playing a full and uninhibited role in politics. If we insist upon a more limited role for religious values, then we eliminate the predicate for Smith's aversion to Free Exercise Clause exemptions. As I show in Part II(A), if the rules of the political game set by the Establishment Clause place a special disability on religious values -- a disability that is not placed on secular values -- then there is a powerful case for such exemptions. The religious conscientious objector can now justifiably claim not only that her religion

forbids her from obeying the law in question but also that she was excluded from seeking to enact into law the values of that religious faith. Because the person advancing religious faith as a source of value has not been treated as a full participant in the political process, the Free Exercise Clause should be construed to require at least prima facie exemptions from law's obligation. In Part II(B), I discuss how this offset between the Establishment Clause and the Free Exercise Clause works, and explain that merely permitting accommodation of religion as an act of legislative toleration is insufficient to offset the Establishment Clause burden. In Part II(C), I discuss whether Free Exercise Clause exemptions can be justified absent the predicate of an Establishment Clause burden. Finally, in Part II(D), I explain that not every value excluded from politics deserves protection from politics through exemptions.

A. The Need for an Offset

In the lawmaking process, we are free to make political, moral, and philosophical arguments to support our positions. But the central point of the Establishment Clause argument made above is that the lawmaking process in a nontheistic government should not involve appeals to religious faith. In fact, one principal feature that distinguishes a country like ours from theocracies is the preclusion of law based expressly on religion. Religious belief goes a step [*1634] beyond standard measures of justification for law: It involves a leap of faith to an extrahuman source of value. One can try to persuade others to take the same leap (by evangelizing and proselytizing, say), but the ultimate leap that religious argument calls for is different from what political, moral, or philosophical argument demands. Because of this difference, the latter should be part of public political justification; the former should not.

Enter the Free Exercise Clause. Lawmaking is a "contractual" process in the sense that if the political, moral, or philosophical arguments that we favor fail to attract enough support, we are bound by the resulting law even if it violates our political, moral, or philosophical sensibilities. Part of losing -- of being the minority on an issue -- is having to obey the law or to suffer the consequences. But precisely because we should exclude religious faith from being the express basis for law, an appeal to faith as the ground for a constitutional right of conscientious objection does not violate the "contractual" premise of obedience once one loses. The person basing a claim of conscience on faith hasn't lost the "faith argument" on the political playing field; if the process went as it should have, that argument was never allowed onto the playing field.

Sometimes the position that religious faith should be kept out of law is understood to forbid all legislative exemptions for religion. n67 On this view, we separate religion from civil government by denying it recognition as the basis either for law or for exemptions from law. This position secures a sort of facial or formal "neutrality." But if we preclude faith from being the express purpose behind law, then exemptions are required to compensate religious people for the obstacle that this disability poses to their participation in the democratic process. Just as we grant special judicial protection to discrete and insular minorities who are effectively excluded from political power, n68 and just as we enhance judicial scrutiny when legislation blocks the channels of political change, n69 so should we recognize the need for religious exemptions from laws created by a process that is closed in an important way to religious people.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n67 See Kurland, supra note 49, at 7; Marshall, Defense, supra note 7, at 326; Marshall, Case Against, supra note 7, at 397. But see Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 11, 13.

n68 See United States v. Carolene Prods. Co., 304 U.S. 144, [illegible] (1938).

n69 For an extensive elaboration on this theme, see JOHN HART [illegible], DEMOCRACY AND DISTRUST (1980).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Thus, the Free Exercise Clause can be seen as providing a political counterweight to the Establishment Clause. If the latter should be read to prevent law from being based expressly on religious faith, then the former should be construed to make religious faith a ground for avoiding the obligations of law. In other words, a religious person can justifiably say, [*1635] "You're keeping my religion out of your politics, now keep your politics out of my religion."

This argument permits "religion" to mean the same thing in the Free Exercise Clause that it means in the Establishment Clause. That is as it should be, for the word appears only once in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." n70 The text strongly indicates that "religion" was meant to refer to the same thing in both clauses. n71

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n70 U.S. CONST. amend. I.

n71 See, e.g., Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting). But see RICHARDS, supra note 23, at 145.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The text also indicates that religion was meant to be special [illegible] that must religious values together with secular ones and result in a [illegible] Establishment Clause ("all values may compete as the ground of law beefed-up Free Exercise Clause ("secular and religious conscientious objection should be treated the same") n72 do not take "religion" seriously, by treating it as merely special and different -- and thus worthy of two constitutional clauses of its own. Instead, both clauses treat religion as special because it must be kept separate from normal politics: Just as we should reduce the role of religious faith in imposing legal obligations on those who don't share the faith, so should we expand the role of religious faith in grounding exemptions from otherwise valid laws.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n72 On the latter point, see infra Part III.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Thus, although I agree with Steven Smith that "religion's truly distinctive qualities inhere . . . in its religious or spiritual dimensions," n73 I disagree with him that we must therefore treat religious faith as a source of normative authority for our politics that can play a full role in grounding law. Unlike the religionists, who deem all sources of value equally part of politics, my claim is that "references out" have an (often unintentional) effect similar to children's taunts of "I know something you don't know," and should be given a reduced role in politics because of the way in which they exclude nonbelievers. On the other hand, unlike the secularists, who argue that Free Exercise Clause exemptions would unjustifiably privilege religion, n74 I take religion seriously as special here, too, and would require exemptions precisely because the premise of the no-exemptions position -- that one must obey the result of politics in which one has been given full opportunity to participate -- should no longer apply.

- -Footnotes- - - - - - - - - - - - - - - - - - - -

n73 Smith, Rise and Fall, supra note 19, at 219.

n74 See Kurland, supra note 49, at 7; Marshall, Defense, supra note 7, at 326; Marshall, Case Against, supra note 7, at 397.

- -End Footnotes- - - - - - - - - - - - - - - - - - - -

[*1636] B. How the Offset Works

It might seem that exemptions are necessary only when religious arguments actually are advanced and excluded from legislative debate. But if we take seriously the exclusion of religious arguments from politics, then we have altered a religious person's ability to participate in politics across the board and not just in specific instances. In response to this wholesale exclusion of expressly religious arguments from politics, a religious person may legitimately claim exemption from laws that burden her religious practice, regardless of whether she was in fact precluded from making a religious argument in the debates that led to the particular law that is now seen as burdensome. So, for example, even if the members of the Native American Church in Smith did not actually participate in the debate leading to Oregon's controlled-substance laws, they should still be able to claim a prima facie exemption from those laws as applied to the sacramental ingestion of peyote. This result holds in part because of a counterfactual: Had those practitioners of Peyotism entered the legislative debates, they should have been precluded from urging their religious values as a source of law. Even apart from the counterfactual, the members of the Native American Church may legitimately argue, "You have precluded us generally from urging our religious values as a source of law; therefore, you should generally permit us to claim exemptions from laws that burden our religion."

It is easy to see how a religious minority might be burdened by an otherwise valid law: Because the incidental, unintended effects of the law do not burden the majority, members of the majority are less likely to tailor the law to prevent such incidental burdens on the minority. But one might suggest that we sufficiently compensate minority religions for any Establishment Clause burden by giving legislatures the discretion -- not the obligation -- to enact toleration-based exemptions. If we exclude religious faith from grounding law, the argument would go, then we offset this burden by permitting the burdened

group to argue for an accommodation of its religious practice.

The ability to argue for a toleration-based exemption is insufficient compensation for the Establishment Clause burden because members of the minority religion still are prevented from urging more general legislation to advance their beliefs. Consider a state in which marijuana use is a crime. As noted above, a decriminalization law could be based on the desirability of tolerating a religious group whose faith compels such use. But it could not be based expressly on the idea that the faith of that religion is true and that therefore marijuana use should not be criminal. n75 This exclusion removes [*1637] some arrows from the religious group's quiver; religious faith as such has been disabled as an express source of law. The disability is sufficiently substantial that if marijuana use is not decriminalized, the fact that the members of the religion may still ask for an exemption from the criminal law isn't sufficient to compensate for the burden of not being able to urge the truth of their faith itself as a reason to decriminalize the drug. There are situations in which a general repeal of the law might be the religious group's only shot, because a more limited exemption would not pass.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n75 Although there might be no plaintiff with standing sufficient to challenge such a law, I am assuming that legislators will act pursuant to proper constitutional norms and that the Establishment Clause argument made in Part I is a proper constitutional norm.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The facts of Smith and of this hypothetical case, however, suggest another objection. Are we really disabling the members of the minority religion by excluding religious faith from grounding law? If there was no chance that the minority could have enacted its faith into law, isn't the disability ephemeral?

It is true that many cases about Free Exercise Clause exemptions involve minority religions that would have been hard pressed to garner majority support for enacting their faith into law. But the Establishment Clause argument advanced here still excludes certain values from grounding law, and in particular it prohibits a minority religion from seeking to persuade the majority that it should enact a law because the minority faith is the true one. Furthermore, legislation often passes even if backed by less than "the majority"; smaller groups often capture the legislature for particular programs, and the arguments of such small groups -- although insufficient to carry the day alone -- might in some cases be enough to tip the legislative balance. If we are forbidding religious faith from playing even this incremental role, then the proper compensation is to construe the Free Exercise Clause as requiring exemptions from laws that burden religion.

So far my examples have focused on minority religions. But suppose that a member of a religious majority in the relevant jurisdiction claims a Free Exercise Clause exemption from an otherwise valid law. Here, it is easy to see how the Establishment Clause disability might have harmed members of the majority religion by shifting the way in which favored legislation could be enacted. But one might wonder how it is possible that a law could have the incidental effect of burdening the majority. Wouldn't the majority have prevented the enactment of such a law, or secured the law's repeal?

Again, this view of the legislative process is too simple. Many laws might impose on religious practice burdens not initially recognized as such or simply unanticipated; furthermore, legislation might be passed by a small faction capturing the legislature. For a variety of reasons, members of the majority religion might have insufficient legislative capital to alter such laws, which might be seen as producing good results apart from the burden on religious practice. Arguing that majority religions would never enact law that burdens their faith, like arguing that minority religions could never enact their faith into law, takes too simple a view of a process that often results in laws enacted [*1638] because of a strong push by a small group and in laws with unintended effects that prove hard to undo because of the laws' concomitant benefits.

Let me offer some more specific examples of how the offset might work. (Note at the outset that under Smith, Free Exercise Clause exemptions would not be required in any of the following situations.) First, consider Epperson v. Arkansas, n76 in which the Court invalidated a law forbidding the teaching of evolution in public school. There wasn't much of a secular argument for banning such teaching; the obvious purpose of the law was to advance the religious faith of those who believed in creationism rather than evolution. By striking the law down, the Court sent a signal that law cannot be grounded in express or otherwise obvious religious purposes. But what if the parents who supported the law sincerely claimed that their religious faith prohibited their children from being taught evolution in the science portion of their public school classes? Under my calculus, they should be entitled to a Free Exercise Clause right (at least prima facie) n77 to remove their children from class during the portions of instruction that violate their religious principles. This prima facie exemption would arise precisely because parents are not allowed to rely on their religious faith to dictate the curriculum of the public schools. n78

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n76 393 U.S. 97 (1968).

n77 Here and in the examples that follow, the right to exemption is only prima facie and might be outweighed by other interests. I do not address how the balance between governmental and individual interests should be struck. See supra note 4.

n78 Cf. Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd and remanded, 827 F.2d 1058 (6th Cir. 1987).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Next, assume a world without Roe v. Wade, n79 and imagine a state with a Catholic majority. Under the view of the Establishment Clause advanced above, the legislature may not ban abortion if the express purpose is to reflect a Catholic view of when life begins. Suppose that abortion remains legal. Now assume that there is a general law compelling doctors to treat indigent patients for all legal medical procedures. Catholic doctors whose religious faith condemns abortion should be exempt from having to perform abortions under this law, because their faith has been removed from the realm of arguments that may be advanced to outlaw abortion.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n79 410 U.S. 113 (1973).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Now assume that a state has a law against polygamy, and that under the Establishment Clause it is improper to repeal the law for the purpose of advancing a religious faith that requires polygamy (although it would be permissible to repeal it out of toleration for that faith). Because the Establishment Clause has altered the political rules in a way that forecloses one route to removing the legislative burden on that faith, a religious practitioner of polygamy should receive a prima facie right to exemption from the law.

Finally, assume that a state makes workers who are fired for good cause ineligible for unemployment compensation. Under my view of the [*1639] Establishment Clause, a law requiring employers to give employees the Sabbath off cannot be passed for the express purpose of advancing a particular religious faith or faiths. n80 As a result, a person who is fired for refusing to work on her Sabbath should be entitled to a prima facie exemption from the eligibility requirement. n81

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n80 Cf. Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

n81 Cf. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

C. Do Free Exercise Clause Exemptions Make Sense Without an Accompanying Establishment Clause Burden?

The standard argument for Free Exercise Clause exemptions has nothing to do with offsetting an Establishment Clause burden. Rather, the argument is that because members of a majority religion are likely to protect their own religious practices when writing laws but to ignore (not necessarily intentionally) the harm that otherwise valid laws cause minority religions, the Free Exercise Clause should be read to protect minority religions against this flaw in the political process. n82

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n82 See Laycock, supra note 25, at 1014; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109, 1130-36 (1990); Pepper, supra note 16, at 353; Sullivan, supra note 6, at 216.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

I have two responses to this argument. First, the Court has rejected precisely this approach to protecting minority interests in the race area. n83 Although the white majority often passes laws that cause unintended disproportionate harm to blacks, the Court has held that the Equal Protection

Clause requires a showing of discriminatory intent and does not forbid unintended disparate impact. n84 This is not the place to discuss the virtues and vices of this rule. But so long as the rule is on the books, adopting a different rule for religion requires an argument that religion is different from race in such a way that disparate impact should be policed. By showing how religion is special for Establishment Clause purposes, the argument that I advance in this Article explains why the Free Exercise Clause should be read to require exemptions from unintended harm without relying on the mere existence of disparate impact.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n83 See Marshall, Defense, supra note 7, at 320.

n84 See Washington v. Davis, 426 U.S. 229 (1976).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Second, and more important, it is unclear why religion deserves special exemptions from otherwise valid law unless religion must bear an accompanying burden under the Establishment Clause. What makes religion special -- its reference to an extrahuman source of value -- does not of itself argue for exemptions. That one person's imperative comes from an extrahuman source of value doesn't distinguish her from a person whose imperative comes from intrahuman experience, if both are able to urge those values as grounds [*1640] for law. n85 The "reference out" that makes religion special becomes relevant to the Free Exercise Clause calculus only if one sees it as a reason to disable religion under the Establishment Clause.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n85 One could, of course, recast the argument for exemptions to include both religious and secular conscience. I address this argument in Part III.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

D. How Should We Treat Other Values that Are Not Allowed to Back Law?

And now, a clarification. I have argued that when we exclude religious values from being enacted into law, we should require a compensating exemption from laws that conflict with those values. This does not mean that we should require an exemption from an otherwise valid law that conflicts with racist values (for example) because we have forbidden laws passed with an expressly racist purpose. The only kind of value that we should protect from legal obligation because we have excluded it from grounding such obligation is a value that we otherwise seek to foster when held privately. In contrast to racist values, we exclude religious values from grounding law not because we consider the values bad in and of themselves, but because we consider religious values to be both (a) good things to hold and (b) permissible as the ground of private decisionmaking but not of law. In this way, the religion clauses can be seen as establishing the prototypical public/private line: We exclude religious values from grounding law while including them in the development of the private self. n86 I do not mean to suggest that religious values cannot be public; they simply cannot be public in the sense that they provide the express purpose behind law.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n86 John Garvey has argued that religion is somewhat like insanity, for in both cases we exempt someone from legal obligations because of the inaccessibility to others of the agent's reasons for action and because of the special compulsion felt by the agent in acting contrary to law. See Garvey, supra note 23, at 798-801. We exempt the insane from legal obligation, however, not because we wish to protect their private values, but rather in spite of the fact that we wish their private values (i.e., their insanity) would go away.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

III. DOES THE CONSTITUTION REQUIRE EXEMPTIONS FOR CLAIMS OF SECULAR CONSCIENCE?

Finally, I want to address the following question: What if someone asks for an exemption from an otherwise valid law based not on religious faith but on moral, political, or philosophical values? In this Part, I explain that although the Constitution should be read to require exemptions for religious conscience, exemptions for secular conscience should receive no such protection. Unlike religious values, secular values may be the express source of law. Because secular values are not excluded from politics, one has no constitutional right to be exempt from laws based on values that differ from one's own.

[*1641] On several occasions, the Court has indicated that the Free Exercise Clause does not extend to secular claims of conscience. In United States v. Seeger, n87 for example, the Court construed a statute granting conscientious-objector status to those with religious opposition to war in any form, but not to those who relied solely on political, sociological, or philosophical considerations. "These judgments have historically been reserved for the Government," the Court said, "and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state." n88 Likewise, in Wisconsin v. Yoder, n89 the Court stressed the limits on its decision that the Free Exercise Clause requires that Amish parents and their children be exempt from compulsory-education laws: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." n90 The Court then stated that merely philosophical claims -- such as Thoreau's -- could not serve as a basis for exemptions under the religion clauses. n91 In Thomas v. Review Board, n92 part of a line of cases requiring Free Exercise Clause exemptions from certain requirements in unemployment-compensation laws for people whose unemployment was caused by their religious faith, n93 the Court added: "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." n94 Quoting from Seeger, Yoder, and Thomas, the Court reached a similar conclusion in Frazee v. Illinois Department of Employment Security. n95

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n87 380 U.S. 163 (1965).

n88 Id. at 173.

n89 406 U.S. 205 (1972).

n90 Id. at 215.

n91 Id. at 216. But see id. at 247-49 (Douglas, J., dissenting in part).

n92 450 U.S. 707 (1981).

n93 See, e.g., Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Sherbert v. Verner, 374 U.S. 398 (1963).

n94 Thomas, 450 U.S. at 713.

n95 489 U.S. 829, 833 (1989).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

These statements, however, came as dicta, for none of these cases involved a Free Exercise Clause challenge based on avowedly secular belief. n96 Although the Free Exercise Clause refers only to "religion," perhaps the text merely begins to answer the interpretive question whether the Constitution -- either in the Free Exercise Clause or elsewhere -- requires an exemption from otherwise valid law for conscientious objectors regardless of the source of their values. Perhaps the Free Exercise Clause is merely the marker of a constitutional value that extends beyond the text; perhaps a structural argument can yield a broader right. n97

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n96 But cf. Welsh v. United States, 398 U.S. 333 (1970).

n97 For ways of interpreting the Constitution structurally to find values beyond the text, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should Be Overruled, 59 U. CHI. L. REV. 381 (1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1642] For instance, one might argue that the Framers referred to religion in the First Amendment because that was the type of belief then being persecuted and hence in need of protection. The broader concept behind the specific conception of protecting "religion" could then be seen as the need to protect all beliefs that are persecuted, and one might base an argument for exemptions on this sort of concept or principle. n98 The most sophisticated effort at such an argument is that of David A.J. Richards in Toleration and the Constitution. Richards maintains that toleration is the central constitutional ideal. "[T]he state must guarantee and secure to persons a greatest equal respect for the rational and reasonable capacities of persons themselves to originate, exercise, express, and change theories of life and how to live it well," he writes. "Thus, the concerns of the religion clauses are instantiated at every stage in which the state may bear upon the process of forming such conceptions, the exercise and expression of such conceptions once achieved, and the changes and revisions in such conceptions." n99 For Richards, "religion" must be broadly defined, to include the nontheistic. In fact, to implement fully the concept of government keeping its hands off the "self-determining moral powers of conscience," n100

religion should be defined relatively "vague[ly]," to include "everything and anything." n101

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n98 See RONALD DWORKIN, LAW'S EMPIRE 70-72 (1986); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 218-21 (1980); Lawrence Lessig, The Fidelity in Translation, 71 TEX. L. REV. (forthcoming April 1993).

n99 RICHARDS, supra note 23, at 136. For similar arguments in the free-speech context, see JOHN STUART MILL, ON LIBERTY (Currin V. Shields ed., 1956) (1859); Thomas Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFFAIRS 204 (1972); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334 (1991).

n100 RICHARDS, supra note 23, at x.

n101 Id. at 141. For other efforts at protecting secular as well as religious claims of conscience, see Gillette v. United States, 401 U.S. 437, 464 (1971) (Douglas, J., dissenting); KONVITZ, supra note 23, at 53, 104; Nuechterlein, supra note 50, at 1136 n.54. Whether Richards' concern extends beyond direct regulation of conscience and to exemptions from laws that only incidentally affect conscience is not clear. There is great force in Richards' argument that direct governmental interference with conscience, religious or otherwise, violates basic constitutional norms. Richards bases his objection to such infringement in the Free Exercise Clause. It might be better, though, to prevent interference with nonreligious conscience under the Freedom of Speech Clause rather than the Free Exercise Clause. Cf. William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 MINN. L. REV. 545 (1983). The First Amendment pairs the Free Exercise Clause with the Establishment Clause, and the text suggests that what is "religion" for the former is "religion" for the latter. See supra note 71 and accompanying text. Reading "religion" broadly to encompass secular claims of conscience risks turning most laws into violations of the Establishment Clause; if it is improper to base a law on "religion," and "religion" includes secular values, then how can any law stand? Richards recognizes this problem and avoids it by arguing that "religion" should be construed more narrowly for Establishment Clause purposes than for Free Exercise Clause purposes. RICHARDS, supra note 23, at 130, 145. This argument seems to do unnecessary violence to the First Amendment text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The answer to this argument follows from the theory developed in Parts I and II. We ordinarily think of "religion" as including a reference to an extrahuman source of value. That is what makes religion special. And it is precisely because of this reference to a source of normative authority that [*1643] cannot be shared by citizens as citizens that we exclude religious faith from being enacted into law. In turn, it is because of that exclusion -- which is special to religious values -- that the holder of such values can claim religious exemptions.

Secular values are not so disabled from politics. It is proper, therefore, to insist that holders of such values learn how to lose as well as win in

politics. The Smith baseline holds for secular values as it does not for religious ones. Because secular values could have been invoked to ground law, one whose values lose out in the legislative process must accept defeat and either obey or become a civil disobedient. Otherwise, laws passed through the democratic process would be merely hortatory.

Of course, there are many reasons why a civilized society, as a matter of legislative grace, might wish to grant exemptions fairly readily for claims of conscience. There is no reason to inflict serious harm (albeit unintended) on members of the community if exemptions from the offending laws can be granted without serious disruption to the community as a whole. Moreover, the community might wish to decrease civil disobedience, and might wish to do so by granting exemptions rather than expanding the prison population. But all of these concerns are properly addressed to legislatures; values that may ground law should not be protected by a constitutional right to an exemption. Both the legislative and executive branches of government, through exemptions and through prosecutorial discretion, can be quite tolerant of conscientious objectors in many contexts and based on many different values. Whether they ought to be so tolerant should be a political question only.

IV. CONCLUSION

Sometimes we win and sometimes we lose in politics. But so long as we may participate fully -- so long as we are permitted to enact our values into law -- we may not insist on being excused from law's obligation if our arguments fail. A general scheme of constitutionally compelled exemptions for claims of conscience would subvert a key predicate of democratic politics -- that losers as well as winners are bound by the values chosen by the majority.

No doubt operating with this principle in mind, the Court in Employment Division v. Smith lumped religious values together with secular ones and permitted no conscience to trump the political process, to become "a law unto itself." This Article has been an attempt to reveal the fallacy of mixing religious values together with secular ones, and thus to provide a theory of constitutionally compelled exemptions for religious conscience. Under the Establishment Clause, I have argued, law may not be enacted for the express purpose of advancing the values believed to be commanded by religion. For religion involves a reference to an extrahuman source of value, which can be [*1644] shared only by believers in the same faith, not by citizens as citizens. Enacting religious faith into law excludes nonbelievers from the legislative process in a real and significant way. But if we construe the Establishment Clause to prohibit legislation enacted for the express purpose of advancing religious values, then the predicate for universal obedience to law has been removed. A religious conscientious objector may legitimately claim that because she was thwarted from offering her values for majority acceptance as law, she should have at least a prima facie right of exemption from law that conflicts with her religion. The Free Exercise Clause works as a counterweight to the Establishment Clause; it gives back what the Establishment Clause takes away.

LEVEL 1 - 96 OF 96 ITEMS

Yale Law Journal

May, 1992

101 Yale L.J. 1491

LENGTH: 19119 words

ESSAY: The Senate, the Constitution, and the Confirmation Process.

David A. Strauss + and Cass R. Sunstein ++

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

+ Professor of Law, University of Chicago Law School. Strauss served as Special Counsel to the United States Senate Committee on the Judiciary in connection with the nomination of Justice David H. Souter to the Supreme Court. The views expressed in this Essay are, of course, those of the authors alone.

++ Karl N. Llewellyn Professor of Jurisprudence, University of Chicago, Law School and Department of Political Science. We are grateful to Akhil Amar, Elena Kagan, Jeffrey Peck, Richard Posner, and Geoffrey Stone for helpful comments on an earlier draft. Bart Aronson, Sonia Bychkov, Daniel Frank, and Thomas Marton provided valuable research assistance.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

SUMMARY:
... It is difficult to find anyone who is satisfied with the way Supreme Court Justices are appointed today. ... But paradoxically, the best first step toward a cure -- the best way to obtain distinguished Justices under current conditions -- is for the Senate to assert, rather than abdicate, its role as an equal partner in the appointment process. ... B. The Meaning of the Shift to Presidential Appointment With Advice and Consent by the Senate ... But it cannot perform that function well if one branch sees the appointment process as an opportunity to put sympathetic Justices on the Court, while the other branch simply defers to the nomination of anyone whose views are not demonstrably extreme. ... Currently, the confirmation hearing is a climactic media spectacle that determines whether the President can slip his nominee (whom everyone knows was chosen in part for her likely voting patterns, despite the President's claims that merit was the exclusive basis) past the Senate (which is also concerned with the nominee's likely votes, notwithstanding the Senators' contention that they are concerned only with character, competence, and whether the nominee is in the "mainstream"). ...

TEXT:
[*1491] It is difficult to find anyone who is satisfied with the way Supreme Court Justices are appointed today. Many of the criticisms are prompted by partisanship, of course. But there is a substantial element of truth in the complaints made by partisans on both sides. And those who are not partisan, but who simply want a healthy process that conforms to the constitutional design and is likely to produce the best appointments, have perhaps the most to

criticize.

In this Essay, we suggest that a return to the confirmation process contemplated by the text and structure of the Constitution -- a process in which the Senate plays a more independent role than it does today -- would help eliminate aspects of the system that both sides, Administration supporters as well as Administration critics, find objectionable. It would also produce a better Court along two dimensions: a Court with Justices of greater distinction, and a Court that reflects a more appropriate diversity of views.

Although often overstated, the criticisms of the current process are telling. Supporters of the Administration object that members of the Senate, and private groups generally critical of the Administration, expend enormous energy not in disinterested inquiry but in trying to "catch" the nominee: to find some statement in her record that reveals a belief so extreme as to be "out of the mainstream." The hearings themselves consist of trying to get the nominee to betray views that will be unacceptable to the public at large, or, failing that, to make inconsistent statements that can be used as evidence of an unprincipled "confirmation conversion." As a result, the Administration's supporters insist, many potential candidates with distinguished records are effectively disqualified from the Court because their opponents can unfairly attack them with isolated statements they have made in the past. The result is an unduly political and sensationalistic spectacle that degrades the Court, the Senate, and the nominee.

[*1492] The Administration's opponents reply that the real problem is that, for the Administration, filling vacancies on the Supreme Court has become a public relations offensive: one that consists of managing images and hiding the ball, while at the same time pushing the Court in a consistent and (to them) unhealthy direction. The President, his opponents say, chooses "stealth" nominees whom he has reason to believe are deeply conservative, but whose views the Senate will not be able to uncover. The White House then carefully prepares the nominees for the confirmation hearings, to the point where there is now practically a script: the nominee is open-minded, has "no agenda," enthusiastically accepts both Brown v. Board of Education n1 and Griswold v. Connecticut, n2 is humbled by the difficulty of being a Justice, and admires Justice Harlan. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1. 347 U.S. 483 (1954) (invalidating segregation of public schools).

n2. 381 U.S. 479 (1965) (striking down ban on use of contraceptives).

n3. The near-compulsory admiration of Justice Harlan is an especially interesting development. It may be based not only on Justice Harlan's evident thoughtfulness and open-mindedness, but also on the fact that he was simultaneously (1) the most conservative Justice on the late Warren Court and (2) the preeminent intellectual source of the modern approach to substantive due process, an approach which culminated in both Griswold and Roe v. Wade, 410 U.S. 113 (1973). For a critique, see Bruce Ackerman, The Common Law Constitution of John Marshall Harlan, 36 N.Y.L. SCH. L. REV. 5 (1991).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The nominees commit themselves to liberal-sounding principles of privacy and racial and gender justice; but the commitments are at such a high level of platitudinous abstraction that they reveal nothing about the nominees' views on controversial issues. n4 And if anything potentially embarrassing surfaces from the nominees' records, the Administration's opponents say, the nominees try to distance themselves from it or to shift attention to other, more attractive aspects of their backgrounds. The consequence is a confirmation process that amounts to a media event unedifying for the public, undignified for the country, and unlikely to produce outstanding Justices or an outstanding Court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4. A related and insufficiently noticed problem is that during the preparation for the hearings, nominees often consult closely for an extended time with officials in the Department of Justice -- the most frequent litigant to appear before the nominee if she is confirmed. See "What's the Alternative?": A Roundtable on the Confirmation Process, ABA J., Jan. 1992, at 41 (remarks of Michael McConnell); see also infra note 107 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Both of these accounts are exaggerated, but neither, unhappily, is very far from the mark. Indeed, the criticisms, though coming from sharply different sources, tend to converge. From the standpoint of the original constitutional plan, the current practice is indeed inadequate. Under the constitutional plan, the confirmation process should involve informed and tempered deliberation within the Senate, the White House, and the public at large about the best way to achieve a distinguished Supreme Court. At the very least, the President and the Senate should attempt to obtain Justices of outstanding character, of high intellectual caliber, and with qualities that will contribute something new or of particular value to the existing Court. Many members of the Senate and the Administration have tried hard to carry out this task. But it is -- to understate [*1493] the matter -- improbable that existing procedures are well suited to its fulfillment.

The unfortunate current situation has many causes, but one that is most immediately apparent is the prolonged division of the federal government between the two political parties. Nominees selected by Republican Presidents have filled the last eleven vacancies on the Supreme Court (and sixteen of the last twenty). But eight of the eleven appointments were made while the Senate was solidly controlled by Democratic majorities. Nothing remotely similar has happened before in our history. n5 Despite this unprecedented situation, Republican Presidents have made ideological appointments with little senatorial opposition, even though the Senate was usually controlled by another party. Any effort to evaluate the current situation must come to terms with this striking fact.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5. See infra Appendix.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

One possible response to divided government, and to the troubled Supreme Court confirmation process it has produced, is for the Senate to be more deferential to the Administration's preferences. The Senate might confine itself to a role similar to that traditionally played by the American Bar Association and other advisory groups: to inquire into whether the nominee meets certain standards of character and professional distinction. Under this approach, the Senate could not appropriately consider a nominee's basic commitments or views on controversial issues, unless those views were so extreme as to call into question the nominee's character or competence.

Confining the Senate to this deferential role would certainly eliminate some of the current complaints about the antagonistic nature of the confirmation process, and to this extent it would be an advance. But there is not much else to commend it. From the constitutional standpoint, this recommendation seems perverse. The Constitution requires that the Senate give its "Advice and Consent" to nominations; n6 this language contemplates a more active role than simple acquiescence whenever a nominee is not deeply objectionable. Beyond that, nothing in the structure of the Constitution or the nature of Supreme Court appointments suggests that the Senate should be so deferential. The Senate, no less than the President, is elected by the people. Supreme Court Justices, unlike executive branch appointees, are not the President's subordinates. Often the Court must mediate conflicts between the President and the Congress; one party to a conflict should not have the dominant role in choosing the mediator.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n6. U.S. CONST. art. II, @ 2, cl. 2.

- - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In our view there are other ways, more consistent with the contitutional plan, to deal with the defects of the current confirmation process. The first step is essentially the opposite of the proposal for Senate deference. We suggest that the Senate should assert its constitutional prerogatives more forcefully, unabashedly claiming an independent role. Specifically, the Senate should insist that it has both the authority to "advise" the President and the power to withold its [*1494] "consent" because it disagrees with the nominee's basic commitments on the kinds of issues that are likely to come before the Court.

When Congress considers the President's legislative initiatives, it is not deferential. No one would suggest that Congress should pass every bill the President proposes unless the bill fails some minimal test, analogous to a minimal test of character and competence. Congress is free to reject proposed legislation for political reasons. This is a most familiar part of the system of checks and balances. There is no reason for nominations to the Supreme Court to command greater deference.

At first glance it might seem that our proposal can only make matters worse. The problem, one might say, is that the confirmation process is already too partisan, too focused on ideology, too much a media spectacle, and too unmindful of the qualities of genuine distinction that Supreme Court Justices should have. We do not disagree with the premise. The current process is too ideological and partisan. But paradoxically, the best first step toward a cure -- the best

way to obtain distinguished Justices under current conditions -- is for the Senate to assert, rather than abdicate, its role as an equal partner in the appointment process. Partisanship in Supreme Court nominations is indeed problematic. But one-sided partisanship -- in which only the President, and not the Senate, is allowed to be partisan -- is much worse.

The approach we recommend permits us to suggest several palliatives for the problems posed by partisanship in the confirmation process. In particular, we argue for a reduced emphasis on the role of the confirmation hearings and greater use of the Senate's "advice" function and of the pre-nomination record. The current emphasis on the hearings has produced many of the current difficulties. An independent role, combined with revisions in the process, would yield significant improvements.

In Part I of this Essay, we show how the text, history, and structure of the Constitution contemplate an independent role for the Senate. In Part II, we suggest that an independent role is especially appropriate in current conditions. In Part III, we consider several counterarguments, including the most important: that our approach would unduly politicize the process of choosing Supreme Court Justices. In this final part, we also set out some recommendations for improving the confirmation process.

I. THE CONSTITUTION

The Constitution fully contemplates an independent role for the Senate in the selection of Supreme Court Justices. n7 Article II, Section 2 provides that [*1495] the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." n8 These words assign two distinct roles to the Senate -- an advisory role before the nomination has occurred and a reviewing function after the fact. The consent requirement, if the Senate takes it seriously, places pressure on the President to give weight to senatorial advice as well. At the same time, the advisory function makes consent more likely. The clause thus envisions a genuinely consultative relationship between the Senate and the President. It assumes a deliberative process, jointly conducted, concerning the composition of the Court. n9

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n7. An especially helpful account is James E. Gauch, Comment, The Intended Role of the Senate in Supreme Court Appointments, 56 U. CHI. L. REV. 337 (1989); see also Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L. J. 657 (1970) (arguing that constitutional considerations demand enhanced senatorial scrutiny when giving advice and consent to judicial, as opposed to executive branch, nominees); Luis Kutner, Advice and Dissent: Due Process of the Senate, 23 DEPAUL L. REV. 658 (1974) (arguing that Constitution calls for consultation before appointments); Charles M. Mathias, Jr., Advice and Consent: The Role of the United States Senate in the Judicial Selection Process, 54 U. CHI. L. REV. 200 (1987) (arguing that Senate needs to reconceptualize its role of advice and consent and needs to devote more resources to enhancing role).

n8. U.S. CONST. art. II, @ 2, cl. 2.

n9. In this way the system strikes some recurrent constitutional chords. See Joseph M. Bessette, Deliberative Democracy: The Majority Principle in Republican Government, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980) (arguing that constitutional system of checks and balances was intended to promote deliberative government).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

History supports this view of the text. The most explicit and elaborate contemporaneous exposition was given by George Mason in 1792. Mason wrote:

I am decidedly of opinion, that the Words of the Constitution . . . give the Senate the Power of interfering in every part of the Subject, except the Right of nominating . . . . The Word 'Advice' here clearly relates in the Judgment of the Senate on the Expediency or Inexpediency of the Measure, or Appointment; and the Word 'Consent' to their Approbation or Disapprobation of the Person nominated; otherwise the word Advice has no Meaning at all -- and it is a well known Rule of Construction, that no Clause or Expression shall be deemed superfluous, or nugatory, which is capable of a fair and rational Meaning. The Nomination, of Course, brings the Subject fully under the Consideration of the Senate; who have then a Right to decide upon its Propriety or Impropriety. The peculiar Character or Predicament of the Senate in the Constitution of the General Government, is a strong Confirmation of this Construction. n10

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n10. Letter from George Mason to James Monroe (Jan. 30, 1792), reprinted in 3 PAPERS OF GEORGE MASON 1255 (William T. Hutchinson & William M.E. Rachal eds., 1970).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

As the records of the Constitutional Convention demonstrate, the Constitution's drafters widely shared Mason's view. The Convention had four basic options of where to vest the appointment power: it could have placed the power (1) in the President alone, (2) in Congress alone, (3) in the President with congressional advice and consent, or (4) in Congress with Presidential advice and consent. Some version of each of these options received serious consideration.

[*1496] The ultimate decision to vest the appointment power in the President stemmed from a belief that he was uniquely capable of providing the requisite "responsibility." A single person would be distinctly accountable for his acts. At the same time, however, the Framers greatly feared a Presidential monopoly of the process. They worried that such a monopoly might lead to a lack of qualified and "diffused" appointees, and to patronage and corruption. The Framers also feared insufficient attentiveness to the interests of different groups affected by the Court.

An important feature of the debates was the Framers' effort to design the appointments process in a way that would protect the interests of the small states. In thinking about the appointment of Supreme Court Justices, the Framers thus focused on the likelihood that nominees would be attentive to the various interests affected by the Court. Conflicts between large and small states, a principal political question of the founding period, present a much

less important issue today. But there are now other conflicting interests that are profoundly affected by the composition of the Supreme Court. The Framers contemplated a senatorial role precisely to protect such interests, and to assure a degree of political oversight of the likely votes of Supreme Court nominees. The central importance of this political concern to the selection process, as that process was originally designed, strongly argues against a Presidential monopoly today.

The compromise that finally emerged -- the system of advice and consent -- was designed to counteract all of these various fears. Throughout the Convention, representatives of the smaller states were especially skeptical of a large Presidential role and insistent on the need for the safeguards that the Senate could provide. Representatives of the larger states, concerned with congressional partiality and lack of responsibility, sought to constrain the Senate. n11 The requirement of senatorial advice and consent simultaneously responded to both sets of concerns.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n11. See Gauch, supra note 7, at 348.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

A. The Early Agreement on Congressional Appointment

It is important to understand that during almost all of the Convention, the Framers agreed that the Senate alone or the legislature as a whole would appoint the judges. The current institutional arrangement emerged in the last days of the process. On June 5, 1787, the standing provision required "that the national Judiciary be [chosen] by the National Legislature." n12 James Wilson spoke against this provision and in favor of Presidential appointment. n13 He claimed that "intrigue, partiality, and concealment" would result from legislative [*1497] appointment, and that the President was uniquely "responsible." n14 John Rutledge responded that he "was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy." n15

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1966).

n13. Id. at 126.

n14. Id. at 119.

n15. Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

James Madison agreed with Wilson's concerns about legislative "intrigue and partiality," but he "was not satisfied with referring the appointment to the Executive." n16 Instead, he proposed to place the power of appointment in the Senate, "as numerous eno' to be confided in -- as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable

and independent to follow their deliberative judgments." n17 Thus, on June 5, by a vote of nine two, the Convention accepted the vesting of the appointment power in the Senate. n18

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n16. Id. at 120.

n17. Id. (footnote omitted).

n18. Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

On June 13, Charles Cotesworth Pinckney and Roger Sherman tried to restore the original provision for appointment of the Supreme Court by the entire Congress. n19 Madison renewed his argument and the motion was withdrawn. n20

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n19. Id. at 224, 232 n.12.

n20. Id. at 232-33.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The issue reemerged on July 18. Nathaniel Ghorum claimed that even the Senate was "too numerous, and too little personally responsible, to ensure a good choice." n21 He suggested, for the first time, that the President should appoint the Justices, with the advice and consent of the Senate -- following the model set by Massachusetts. n22 Wilson responded that the President should be able to make appointments on his own, but that the Ghorum proposals were an acceptable second best. n23 Alexander Martin and Sherman endorsed appointments by the Senate, arguing that the Senate would have greater information and -- a point of special relevance here -- that "the Judges ought to be diffused," something that "would be more likely to be attended to by the 2d. branch, than by the Executive." n24 Edmund Randolph echoed this view. n25

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n21. 2 id. at 41.

n22. Id.

n23. Id.

n24. Id.

n25. Id. at 43.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In the end, the Ghorum proposal was rejected by a vote of six to two. At that point, Ghorum suggested, as an alternative, that the President should nominate and appoint judges with the advice and consent of the Senate. On

this the vote was evenly divided, four to four. n26

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n26. Id. at 44.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1498] Madison then proposed Presidential nomination with an opportunity for Senate rejection, by a two-thirds vote, within a specified number of days. n27 Changing his earlier position, Madison urged that the executive would be more likely "to select fit characters," and that "in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that 2/3 of the 2d. branch would join in putting a negative on it." n28 Pinckney spoke against this proposal, n29 as did George Mason, who argued: "[A]ppointment by the Executive [is] a dangerous prerogative. It might even give him an influence over the Judiciary department itself." n30

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n27. Id.

n28. Id. at 80.

n29. Id. at 81.

n30. Id. at 83.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The motion was defeated by six to three. By the same vote, the earlier Madison proposal, in which the Senate would appoint the Justices, was accepted. n31

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n31. Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The issue next arose on August 23. Robert Morris argued against the appointment of officers by the Senate, considering "the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility." n32 But it was not until September 4 that the provision appeared in its current form. n33 Morris made the only recorded pronouncements on the new arrangement and seemed to speak for the entire, now unanimous assembly. Morris said, "[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." n34 Great weight should be given to the remarks made by Morris because of their timing. The Convention accepted the provision with this understanding.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n32. Id. at 389.

n33. Id. at 495.

n34. Id. at 539.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. The Meaning of the Shift to Presidential Appointment With Advice and Consent by the Senate

This picture leaves something of a puzzle. For almost all of the Convention, the appointment power was vested in the Senate. At the last moment, it was shifted to the President, with the advice and consent of the Senate. What accounts for the shift?

We speculate that two developments played an important role. First, on July 16, 1787, the Convention approved the Great Compromise, allowing equal representation for the states within the Senate despite their differences in population. This additional security for the small states may have provided those states with a degree of reassurance that made a Presidential initiative in the appointments process significantly less threatening. That reassurance, going [*1499] to the structure of the document, may have made it less necessary to insist on limiting the President's role in appointments. n35

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n35. The argument is advanced in Gauch, supra note 7, at 347-50.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Second, the assessment of Presidential powers appears to have changed in a major way when the Founders devised the Electoral College, thereby allowing a degree of representation of states qua states in the selection of the President. n36 As we have seen, much of the resistance to Presidential power came from the small states, which feared that the President would be inattentive to their interests. Once it was decided that the President would be selected through the new, protective route, the small states had a new degree of security against the obvious risks, from their point of view, of pure majoritarianism. They therefore would have found it less threatening to vest the power of appointment in the President in the first instance. The Framers could accomplish the central goal of ensuring "responsibility" without undue risk to state interests.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n36. See CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 171 (1988); CHARLES C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 97-104 (2d ed. 1969).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

But there is no evidence of a general agreement that the President should have plenary power over the appointments process. On the contrary, the ultimate design mandated a role for the Senate in the form of the advice and consent function. In this way, it carried forward the major themes of the debates. With respect to the need for a Presidential role, the new system ensured

"responsibility" n37 and guarded against the risk of partiality in the Senate. With respect to resistance to absolute Presidential prerogative, the principal concerns included (1) a fear of "monarchy" n38 in the form of exclusive Presidential appointment; (2) a concern for "deliberative judgments"; n39 (3) a belief that "the Judges ought to be diffused," n40 that is, diverse in terms of their basic commitments and alliances; (4) a fear of executive "influence over the Judiciary department itself"; n41 and (5) a desire for the "security" n42 that a senatorial role would provide.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n37. See supra note 34 and accompanying text.

n38. See supra note 15 and accompanying text.

n39. See supra note 17 and accompanying text.

n40. See supra note 24 and accompanying text.

n41. See supra note 30 and accompanying text.

n42. See supra note 34 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As Mason's comments suggest, the Senate's role was to be a major one, allowing the Senate to be as intrusive as it chose. Even Hamilton, perhaps the strongest defender of Presidential power, emphasized that the President "was bound to submit the propriety of his choice to the discussion and determination of a different and independent body." n43 Of course, the President retained the power to continue to offer nominees of his selection, even after an initial rejection. He could continue to name people at his discretion. Crucially, however, [*1500] the Senate was granted the authority to continue to refuse to confirm. It also received the authority to "advise."

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n43. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

These simultaneous powers would bring about a healthy form of checks and balances, permitting each branch to counter the other. That system was part and parcel of general deliberation about Supreme Court membership. The Convention debates afford no basis for the view that the Senate's role was designed to be meager. On the contrary, they suggest a fully shared authority over the composition of the Court. That shared authority was to include all matters that the Senate deemed relevant, including the nominee's point of view.

As we have noted, this argument derives particular force from the centrality of the question of states' interests to the debate over the appointments process. The split between the large and small states was among the most important political issues of the period. Some delegates were fearful that all judicial nominees would come from large states. More generally, state

rivalry, dominating the debates over the appointments clause, was the functional equivalent of the most sharply disputed of current legal and political debates. There can be no question that the "advice and consent" role was intended to provide, in Morris' terms, "security." And there can be no question that a central aspect of "security" was the power to refuse to confirm nominees insensitive to the interests of a majority of the states. In this sense, political commitments were understood to be a properly central ingredient in senatorial deliberations. n44

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n44. See Gauch, supra note 7, at 363.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

C. The Early Practice

The practice of the Senate in the early days of the republic and thereafter attests to the same conclusion. n45 George Washington's nomination of John Rutledge, then Chief Justice of South Carolina, as Chief Justice of the United States is the most revealing case in point. n46 Rutledge's challenge to the Jay Treaty, n47 negotiated by Washington with Great Britain, played a pivotal role in the confirmation process. The Jay Treaty was challenged by the Republicans as a concession to Britain but approved by the Federalists as a way of keeping the peace. Rutledge attacked the treaty in a prominent speech in Charleston. The Federalists sought to block the Rutledge appointment on straightforwardly political grounds. Hamilton, a leader of the support for the Jay Treaty, led the opposition to Rutledge. The Senate ultimately rejected Rutledge for political reasons, by a vote of fourteen to ten. n48

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n45. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 71-94 (3d ed. 1992).

n46. See LAURENCE TRIBE, GOD SAVE THIS HONORABLE COURT 79-80 (1984); Gauch, supra note 7, at 358-62.

n47. Agreement with Great Britain, Nov. 19, 1794, 8 Stat. 116, T.S. No. 105.

n48. There was talk as well of Rutledge's "insanity," but this seemed pretextual. See Gauch, supra note 7, at 360-62.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1501] Nor was the Rutledge rejection unique. In 1811, the Senate rejected Madison's appointment of Alexander Wolcott, partly on the basis of political considerations. In 1826, President Adams' appointment of Robert Trimble was nearly rejected on political grounds. The 1828 nomination of John Crittenden, a Whig, was ultimately prevented through postponement, and squarely on ideological grounds. Similar episodes occurred in the first half of the nineteenth century. In fact, during the nineteenth century, the Senate blocked one of every four nominees for the Court, frequently on political grounds. n49

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n49. See ABRAHAM, supra note 45, at 39-42; JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 302-03 (1953).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Senate has at times insisted on the "advice" segment of its constitutional mandate. In 1869, President Grant nominated Edwin Stanton after receiving a petition to that effect signed by a majority of the Senate and the House. n50 In 1932, the Chair of the Judiciary Committee, George W. Norris, insisted on the appointment of a liberal Justice to replace Oliver Wendell Holmes. n51 Greatly influenced by a meeting with Senator William Borah, President Hoover eventually appointed Benjamin Cardozo to the Court. The Senator persuaded President Hoover to move Cardozo, then at the bottom of the President's list of preferred nominees, to the top. n52

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n50. See ABRAHAM, supra note 45, at 127.

n51. See id. at 204.

n52. See id. at 205-06.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

D.The Constitutional Structure

We have established that the constitutional text and history support an independent role for the Senate in the confirmation process. In the particular context of judicial appointments, there is an additional and highly compelling concern, one that stems from constitutional structure. It may be granted that the Senate ought generally to be deferential to Presidential nominations involving the operation of the executive branch. For the most part, executive branch nominees must work closely with or under the President. The President is entitled to insist that those nominees are people with whom he is comfortable, both personally and in terms of basic commitments and values. n53

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n53. This seems to follow from Myers v. United States, 272 U.S. 52, 135 (1926) (suggesting that President has power to supervise executive officers even when they are exercising discretion in their ordinary duties prescribed by statute, and power to remove them for unwise use of such discretion). The constitutional text, mandating Senate involvement in the appointment process, is identical for the Senate's review of Supreme Court and executive branch nominees. There is thus an argument from the text that an independent senatorial role is appropriate in all cases. Considerations of history and structure, however, suggest that the cases might be treated differently. The complex history summarized above, see supra notes 7-44 and accompanying text, argues strongly for an independent role for the judicial branch nominees, and it applies only to these nominees. There is no corresponding debate for executive branch nominees. As discussed in the text, the structural considerations

argue against an independent role for the Senate with respect to executive branch employees, and for such a role with respect to Supreme Court nominees. See infra Part II.E. (discussing separation of powers reasons for independent investigation of judicial nominees).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1502] The case is quite different, however, when the President is appointing members of a third branch. The judiciary is supposed to be independent of the President, not allied with him. It hardly needs emphasis that the judiciary is not intended to work under the President. This point is of special importance in light of the fact that many of the Court's decisions resolve conflicts between Congress and the President. A Presidential monopoly on the appointment of Supreme Court Justices thus threatens to unsettle the constitutional plan of checks and balances.

Constitutional text, history, and structure strongly suggest that the Senate is entitled to assume a far more substantial role than it has in the recent past. There are analogies to proposed legislation and treaties, and to the Presidential veto. No one thinks that the Senate must accept whatever bill or treaty the President suggests simply because it is a "competent" proposal; it would be odd indeed to claim that the President must sign every bill before looking closely at the merits. Under the Constitution, the role of the Senate in the confirmation process should be approached similarly.

II. THE SENATE'S ROLE IN AN ERA OF DIVIDED GOVERNMENT

For much of the twentieth century, the Senate has not made independent judgments of the kind we urge for Supreme Court nominees. Until 1968, only one nominee had been rejected by the Senate in this century. n54 There is some controversy over exactly how independent a role the Senate played in the nineteenth century. n55

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n54. See ELDER WITT, GUIDE TO THE U.S. SUPREME COURT 995-98 (1990).

n55. See TRIBE, supra note 46, at 58-59.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

But since 1969, circumstances have changed. Current conditions -- conditions that are unique in our history -- justify a more active role for the Senate. n56 These circumstances include a large number of consecutive appointments by Presidents of one party during a period of divided government; the danger of intellectual homogeneity on the current Court; overt ideological attacks by the President on the Court and the self-conscious screening of [*1503] nominees to the Court by the executive branch; the effective exclusion of the Senate from the selection of lower federal court judges; and the increased importance of separation of powers questions. Under these conditions, deference by the Senate is likely to produce neither a Court of high quality nor a Court with the appropriate range of views. n57

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n56. In the last 23 years, two nominees have been withdrawn to avoid Senate defeats (Fortas and Ginsburg) and three have been defeated (Haynsworth, Carswell, and Bork). Thus, the Senate has stopped Presidential nominees in 5 of 16 attempts, which amounts to 31%, a high percentage. However, no understanding has emerged on the part of the Senate that it is entitled to undertake an independent inspection of the nominee's likely voting record. Indeed, it appears that many Senators believe that such a role would be unacceptable. See, e.g., 137 CONG REC. S9295 (daily ed. July 9, 1991) (statement of Sen. Grassley), 136 CONG. REC. S14,360 (daily ed. Oct. 2, 1990)(statement of Sen. McConnell); 136 CONG. REC. S12,872 (daily ed. Sept. 12, 1990)(statement of Sen. Hatch); 133 CONG. REC. S14,913 (daily ed. Oct. 23, 1987)(statement of Sen Domenici); 133 CONG. REC. S10,537 (daily ed. July 23, 1987)(statement of Sen. Dole).

All in all, there is no clear current understanding on the part of the Senate of its appropriate role in the confirmation process. No sharply defined view has materialized on this question. There is, however, a discernible shift in the direction suggested in this Essay. See, in particular, the proposed Senate Resolution introduced by Senator Simon, calling for "philosophical balance" as a relevant consideration in selecting nominees and requesting "informal, bipartisan consultation with some members of the Senate" before nomination. S. Res. 194, 102d Cong., 1st Sess., 137 CONG. REC. S14,712 (daily ed. Oct. 15, 1991).

n57. The Senate is always entitled to take an independent role and to consider likely voting patterns. It is free to do so even in a period in which the same party controls the Senate and the Presidency. But the argument that such a role would be a stractural imperative of the constitutional plan -- as opposed to constitutionally authorized -- would be far weaker in that event, for reasons set our below. See infra Parts II.A, II.E. The argument for an independent role would be further weakened if the court were not, in the relevant sense, monolithic. A Court with a balance views, See infra Part II.F, Poses a far less urgent case for careful inspection by the Senate of likely voting patterns. For these reasons, we believe that the case for an independent role is currently far stronger than it was, for example, at the time of the nomination of Judge Robert Bork.

Things would be different if one party controlled both the Senate and the Presidency. For example, there would be little need for a Democratic Senate to undertake an independent investigation of the nominee of a Democratic President -- not because the Democratic view is "correct," but because there would be a reduced need for the Senate to serve as an ideological check on the President. (Of course, competence and character would remain relevant.) Almost none of the arguments would be relevant if a Democratic President in (say) 1994 offered nominations to a Democratic Senate. Yet another question would be raised if a Republican Senate in 1994 were confronted by a nominee from a Republican President. Here some of the arguments we offer would remain relevant, but others would cease to be compelling.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

A. Eleven Consecutive Appointments During a Period of Divide Government

The most important circumstance is, of course, prolonged divided government -- specifically, the eleven consecutive Republican appointments, all made while the Democrats controlled the House, nine while the Democrats controlled the

Senate. n58

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n58. Republican Presidents filled vacancies created by 10 Justices who left the Court, and elevated William Rehnquist from Associate Justice to Chief Justice. Because of the Chief Justice's influence and the controversy surrounding the Rehnquist elevation, we count this as eleven appointments.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

American politics has not, in general, been characterized by the alternation of parties in power. n59 Republicans dominated the national government between the Civil War and the New Deal. n60 Democrats then dominated until 1968, n61 and Republicans have won five of the last six Presidential elections.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n59. The principal exception to this is the period before the Civil War. See infra Appendix.

n60. Of the 13 Presidents who served in office from 1868, when Ulysses S. Grant succeeded Andrew Johnson, until 1932, when Franklin Roosevelt defeated Herbert Hoover, 11 were Republicans. The exceptions were Grover Cleveland, elected in 1884 and 1892, and Woodrow Wilson, elected in 1914 and 1918. See infra Appendix.

n61. Between 1932 and 1968, Democrats won seven of nine Presidential elections; the only exception was a war hero, President Eisenhower. See infra Appendix.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Even so, it is nearly unprecedented for one party to fill eleven consecutive vacancies. n62 This is partly the result of the fact that President Carter was the [*1504] only President in history to serve a full term without making a single appointment. n63 More important however, most of these appointments have been made while the Democrats thoroughly controlled Congress. In the past, one party has tended to dominate national politics entirely, controlling both elected branches. The last quarter-century of divided government is genuinely unique in our history. n64

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n62. From Abraham Lincoln until Grover Cleveland, Republicans appointed 14 consecutive Justices. (During part of this period, the Court had 10 Justices.) Presidents Franklin D. Roosevelt and Harry S. Truman made 13 consecutive appointments. (They filled 12 vacancies and elevated Harlan Fiske Stone from Associate Justice to Chief Justice.) President George Washington, of course, appointed the entire membership of the Court, then six Justices. He and President John Quincy Adams, both members of the Federalist Party, made a total of 13 consecutive appointments. At no other time have Presidents from one party appointed more than nine consecutive Justices. See infra Appendix.

Of course, in these instances, the same party controlled both the White House and the Senate -- a crucial difference from current circumstances, as we explain in the text. text. President Washington was not formally a member of any party, but he was generally thought to be affiliated with the Federalists, who controlled the Senate during his administration. See JOHN C. MILLER, THE FEDERALIST ERA 122-24 (1960).

n63. See infra Appendix.

n64. Id..

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

To be sure, the Supreme Court is supposed to be independent of the political controversies of the moment. Its independence is reflected in the constitutional provisions for life tenure and nondiminution of salary. n65 The Court should not track popular opinion; it duty is to interpret the Constitution. But the constitutional plan insulates the Court only to a certain extent. The Consitution makes the Court responsive to popular sentiment as well. The desire for responsiveness is reflected in a selection process in which the President and the Senate play crucial and mutually constraining roles. n66 The Constitution responds to the risk that a Court whose members serve for life may grow too far out of touch with societal convictions. The Constitution ensures that the Court will in a certain sense be attuned to the prevailing interpretive aspirations of the public at large. n67

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n65. U.S. CONST. art. III, @ 1.

n66. See U.S. CONST. art. II, @ 2, cl. 2; supra notes 7-9, 43-44 and accompanying text.

n67. We do not suggest that the Court shoulf "follow th' ilection returns," in Mr. Dooley's words. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 76-77 (2d ed. 1991)(Mr. Dooley was Finley Peter Dunne's pen name). We claim only that there is reason for concern when the Court is dominated by one branch and unchecked by another of similar electoral pedigree. In general, we put to one side the questions of what counts as "too far out of touch," and of what is the proper relationship between existing political convictions and judicial interpretations. The propositions in the text need not depend on controversial answers to these questions.

Of course, it is true that in certain circumstances a Court would do well to be quite out of touch, as in a case in which both elected branches were censoring political speech. In this sense, there are substantive constraints on the sorts of political convictions that properly influence constitutional interpretation, but those substantive constraints do not argue against our proposal here.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

When the people over time elect Presidents of different parties, and Presidents of each party contribute to the Court, this function is well served. The Court's membership then has some connection with the political balance in

the country. When, as during the Roosevelt and Truman Administrations and during most of the post-Civil War period, the people turn over both Congress and the Presidency to one party, this function is again served, though in a different way. The Court does not reflect a balance between the parties -- because there is no such balance in the country. Rather, the Court reflects the dominance of one side of the debate. After 1936, for example, the New Deal "won"; n68 the nation [*1505] was thoroughly committed to it, and Democrats dominated both branches. The Court, with thirteen consecutive appointees by Democratic Presidents, properly reflected the fact that the nation had made up its mind. n69

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n68. See Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453, 511 (1989) ("When the New Dealers gained a crushing victory in the Presidential and congressional elections of 1936, they claimed a mandate from the People in support of their new activist vision of American Government.").

n69. Of course, the nation may have wrongly made up its mind, and in that case the Court's approach to the Constitution after the Democratic appointments could be understood as a capitulation. But until the nation revisits this questions, there is no practical means to control this problem, if indeed it is a problem.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

But in the last twenty-five years the nation has not made up its mind. It has elected mostly Republican Presidents, but mostly Democratic Senates. The composition of the Supreme Court played a role in Presidential campaigns, and it is possible that this issue helped settle the elections as well. We know of no evidence that the composition of the Court has ever played a significant role in either Presidential or senatorial elections. Of course, it is theoretically possible that people voted for Republican Presidential candidates because they wanted a certain kind of Supreme Court; but it is also possible that the composition of the Court played a role in senatorial elections. Any relevant mandate is therefore quite muddled.

In any case, the country has not reached closure on the questions of constitutional method or constitutional result that were raised in the Warren Court, the Burger Court, and the Rehnquist Court. On the contrary, the country is deeply divided. In these circumstances, if the Court is to stay in touch with public convictions (in the limited way that the appointment power envisions), it should not reflect only the President's views. It should reflect the Senate's as well.

B. Overt Ideological Attacks on the Court by the President

A series of appointments by one party will not necessarily reflect that party's ideology. n70 Some appointments in the history of the Court have been indisputably nonideological and nopartisan; sometimes Presidents simply sought a distinguished figure. n71 In such cases, the members of the Senate, even in a period of divided government, cannot complain that their mandate from the people is being ignored by the President.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n70. We use the words "ideology" and "politics" at various points in the Essay. By using such words, we do not intend to take any controversial position about the nature of reasoning in constitutional law. Certainly we do not mean to identify constitutional law with "politics" or "ideology" or to claim that legal reasoning is reducible in that way. But we do believe that it is much too simple to think that the interpretive view of the Reagan and Bush Administrations are simply "faithful to the Constitution," whereas the interpretive views of Justices such as Earl Warren and Hugo Black represented "an abandonment of the Constitution." We insist only that there is a spectrum of reasonable, good faith interpretive positions and that under current conditions it is implausible to think that only one of these positions warrants participation in judicial and public debate.

n71. Justice Cordozo is a good example. See TRIBE, supra note 46, at 80-81. Justice Stevens may be another. We recognize, however, that some would dispute the claim that there are any appointments that are truly nonpolitical. A nomination based purely on quality and character would be hard to imagine. Some people of outstanding ability and outstanding character also have views that are unacceptably extreme, and they are therefore unappointable.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1506] The eleven consecutive Republican appointments do not, in general, fit this description. Those appointments were made by four Presidents -- Nixon, Ford, Reagan, and Bush. Each of these Presidents campaigned on a platform that specifically condemned certain Supreme Court decisions. n72 Each of these Presidents (President Ford to a lesser extent than the others) vigorously criticized the Court during his campaign and again during his Presidency. n73

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n72. There were "planks" involving Roe v. Wade, 410 U.S. 113 (1973), and Miranda v. Arizona, 384 U.S. 436 (1966). See 2 NATIONAL PARTY PLATFORMS 868, 972, 976 (Donald B. Johnson ed., 1978) (1972 and 1976 platforms); NATIONAL PARTY PLATFORMS OF 1980, at 183, 189 (Donald B. Johnson ed., 1982); OFFICIAL REPORT OF THE PROCEEDINGS OF THE THIRTY-FOURTH REPUBLICAN NATIONAL CONVENTION 343 (1988).

n73. See 1970 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 937; 1969 id. at 818; 1983 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 876; Bernard Weinraub, Bush Seeking Way to Circumvent Court's Decision on Flag Burning, N.Y. TIMES, June 27, 1989, at A1. Criticism of the Court by the President is not a Republican monopoly. President Roosevelt was at least as strongly critical;

[We] have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself . . . . We want a Supreme Court which will do justice under the Constitution -- not over it . . . This plan save our National Constitution from hardening of the judicial arteries.

Franklin Delano Roosevelt (radio broadcast, Mar. 9, 1937), in GERALD GUNTHER, CONSTITUTIONAL LAW 123 (12th ed. 1991).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

We do not argue that this is necessarily an inappropriate thing for a President to do. Concerns of this sort can be a fully legitimate part of the nomination process. Nor do we contend that the resulting nominees have been undistinguished. But when a President has criticized the Court so strongly on such grounds, the President's appointments can be counted on to reflect his own commitments. When the people elect a Senate with different convictions from those of the President, there is no reason for the appointments to reflect the President's views alone. Under the constitutional plan, the Senate need not sit idly by while a consistent stream of Presidential appointments leads the Court in a direction of which it disapproves.

C. Screening of Nominees by the Administration, With a View Toward Likely Voting Patterns and Judicial Commitments

If the President, regardless of his statements during a campaign, deliberately sought to make nonpartisan appointments, the Senate would have much less warrant for injecting concerns about likely voting patterns. But with two arguable exceptions -- Justices Stevens and Powell n74 -- there can be little doubt that recent Republican Presidents have made appointments on the basis of their criticisms of the Court, attempting to fill vacancies with people with certain predictable commitments. We do not suggest that there has necessarily been a "litmus test" on such issues as abortion or affirmative action. But it seems [*1507] indisputable that these Presidents have generally attempted to choose Justices with predictable views about the role of the Court, and whose positions on the most controversial issues facing the Court were likely to conform to the President's own views.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n74. Both of these men were known for a high degree of professionalism, and neither was thought to be easily identifiable with partisan considerations. Both, however, were expected to vote as conservatives or moderate conservatives.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

President Nixon did not attempt to conceal the real bases of his appointments. When he announced the appointments of Chief Justice Burger and Justice Blackmun, for example, he said that one of his reasons for choosing them was to change the Court's direction in criminal procedure cases. n75 Nixon said his appointees shared his conservative judicial philosophy in contrast to the "activist" philosophy of the Warren Court, obviously referring to their basic judicial orientation, especially in such areas as race discrimination and criminal procedure. n76

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n75. See, e.g., 1969 Public Papers of the Presidents of the United States: Richard Nixon 396.

n76. See, e.g., 1969 id. at 396; 1971 id. at 1055.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In the Reagan and Bush Administrations, the screening of Justices has been institutionalized. (The same is true of federal lower court judges, an important point we consider below.) Officials in the Department of Justice and the White House have played a prominent role in selecting Justices. n77 The public statements of Presidents Reagan and Bush have also generally confirmed that the nominees were chosen because of their conceptions of the appropriate judicial role. n78

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n77. See generally Herman Schwartz, Packing the Courts: The Conservative Campaign to Rewrite the Constitution 58-149 (1988); see also Sheldon Goldman, The Bush Imprint on the Judiciary, 74 Judicature 294 (1991) (describing selection process under Bush); Sheldon Goldman, Reagan's Judicial Legacy: Completing the Puzzle and Summing Up, 72 Judicature 318 (1989) (describing selection process under Reagan). For example, the Reagan Administration created the Committee on Federal Judicial Selection, and White House Counsel C. Boyden Gray currently chairs it. Id.

n78. See, e.g., Linda R. Campbell, Health May Be Fading, But Marshall's Wit Still Sharp, Chi. Trib., June 29, 1991 at 1 (President Bush says that he would replace Justice Marshall with "somebody that would be seen as keeping with the judicial philosophy that I've always expounded . . . interpretation, not legislation"); David Hoffman, Reagan Relied on His Instincts, Wash. Post, June 18, 1986, at A1 (Administration officials say that President Reagan's primary goal in selection of Rehnquist as Chief Justice was Rehnquist's agreement with President's philosophy of judicial restraint); Steven R. Weisman, Reagan Aides Say 'Short List' of Candidates for Court Is Ready, N.Y. Times, July 1, 1981, at A19 (White House officials make clear that President Reagan wants a nominee "to be compatible with his overall philosophy of judicial restraint").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

D. The Effective Exclusion of the Senate from the Selection of Lower Federal Court Judges

During the last few years, the Senate has been effectively excluded from the selection of lower federal court judges. This aspect of the current situation is not widely noted, but it adds to the case for Senate independence in the selection of Supreme Court Justices. In the last twenty-five years, there have been two very significant changes in the composition of the courts of appeals. First, the size of those courts has expanded enormously. Second, the Administration [*1508] now systematically screens lower federal court judges on several grounds, including the way they are likely to vote.

In 1968, there were 83 court of appeals judges. n79 As late as 1978, there were 95 court of appeals judges. n80 Now there are 154. n81 The turnover rate is, correspondingly, much greater today. As a result, it is essentially impossible for the Senate effectively to monitor the composition of the federal courts of appeals.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n79. 1968 Annual Report Of The Director Of The Administrative Office Of The United States Courts 90.

n80. 1978 id. at 128.

n81. 947 F.2d vii-xxxii (1992).

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The executive branch, using a variety of formal and informal networks, can track potential judicial nominees for years, observing their development and assessing their orientation on issues likely to come before the courts. When a vacancy occurs, the Administration can move quickly to nominate a person who is already relatively well known to it. The Senate will not have the same degree of familiarity with the nominee. Moreover, while the executive branch has as much time as it needs to study a person before appointing her, the Senate has little time to act: once the President has nominated someone to fill a vacancy, the Senate cannot delay its decision for long without appearing irresponsible. Even if the Senate did mobilize its resources, study the nominee, and decide to reject her, it would have to repeat the process all over again with another nominee who was known to the Administration but not to the Senators. In theory, the Senate could establish a duplicate bureaucracy and investigate each nominee to the lower courts as thoroughly as it wished. But the expense, and the political costs of the delay, would be prohibitive.

The result of the institutionalized screening of lower federal court judges is that the Administration can effectively fill the lower courts with judges committed to its basic views, and the Senate is virtually powerless to resist. Again, we do not argue that it is always inappropriate for the President to seek ideologically compatible nominees for the lower courts. Screening of this sort might, on the whole, produce nominees more capable than those produced by the patronage system that characterized earlier times. n82 If the Senate shared the President's basic orientation, then executive branch screening might not necessarily be a bad thing. n83 But when the country is divided on certain issues, it is difficult to see why the federal judiciary should be monolithic on the matters over which divisions persist. n84

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n82. Even now the President sometimes pays considerable attention to the views of the Senator from the state in which the appointment will be made. But this holdover from the patronage system is no substitute for more general senatorial participation.

n83. The point raises some complex issues about the relationship between the Court and existing convictions within the political process. See supra notes 68-69 and accompanying text.

n84. See supra Part II.A. As a matter of constitutional text and structure, there is no barrier to an independent senatorial role in the nomination of lower court judges; there is no difference for these purposes between the Supreme Court and the lower courts. The Senate is perfectly entitled to look carefully at nominees to the lower courts as well. We do not, however, argue for such a role in light of the evident burdens of time and resources that such a role would entail.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1509] Because the Senate is essentially unable to affect the composition of the lower courts, Supreme Court appointments are even more important today than in the past. They are the Senate's only realistic opportunity to influence the orientation of the federal judiciary. Unlike an appointment to a court of appeals, a Supreme Court appointment is infrequent and so important that the Senate can afford to invest the resources needed to investigate nominees thoroughly. If the Senate is not willing to take an independent look at Supreme Court nominees, however, then a committed executive is free to dominate the entire federal judiciary.

E. The Increased Importance of Separation of Powers Issues

As one would expect, the era of divided government has given rise to an unusually large number of disputes between the branches. Often the Court must resolve disputes involving the allocation of power between the President and the Congress. The constitutionality of the independent counsel provision of the Ethics in Government Act of 1978, n85 the Gramm-Rudman-Hollings Act, n86 and the Sentencing Commission n87 are recent illustrations. In the future, there is likely to be litigation over the constitutionality of institutional arrangements designed to limit Presidential control of the administrative process. n88

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n85. Pub. L. NO. 95-521, 92 Stat. 1820 (codified as amended at 28 U.S.C. @@ 49,591 (1988)); Morrison v. Olson, 487 U.S. 654 (1988) (upholding independent counsel provision). 9Tn86. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. @ 901 (1988 & Supp. II 1990)); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating Comptroller General provision of Gramm-Rudman-Hollings Act).

n87. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (codified at 18 U.S.C. @@ 3351-3673) (1988); 28 U.S.C. @@ 991-998 (1988)); Mistretta v. United States, 488 U.S. 361 (1989) (upholding creation of Sentencing Commission).

n88. See, e.g., S. 1942, 102d Congress, 1st Sess. (1991) (impossing various constraints on process of Presidential review of regulations).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The problem, however, goes much deeper. Recurring and now sharply debated issues of statutory construction have raised important conflicts between the executive branch and the Congress. Such issues include, most notably, the role of legislative history in statutory interpretation n89 and the degree of deference to be given to administrative interpretation of statutes. n90 In the resolution of such conflicts lies much of the de facto power of the executive branch and the legislature. For example, there would be a large increase in executive power, in some ways at the expense of the Congress, if the Supreme Court were to hold that legislative history is irrelevant and that administrative interpretations prevail in the face of any slight ambiguity in the statutory text.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n89. See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring in judgment); United States v. Stuart, 489 U.S. 353, 371-77 (1989) (Scalia, J., concurring in judgment).

n90. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1510] The Court will undoubtedly confront all of these questions in the next decade. The Civil Rights Act of 1991, n91 for example, may raise important questions about the role of legislative history in statutory interpretation. n92 There may be a new array of arrangements in which Congress attempts to participate in the implementation of federal law or to limit the President's power to control implementation. The degree of deference owed to administrative interpretations remains sharply disputed. These cases will raise difficult and fundamental questions about governmental structure.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n91. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

n92. See Paul Gewirtz, Discrimination Endgame, NEW REPUBLIC, Aug. 12, 1991, at 18; Paul Gewirtz, Fine Print, NEW REPUBLIC, Nov. 18, 1991, at 10.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Traditionally the Court has functioned as a mediator between the branches. But it cannot perform that function well if one branch sees the appointment process as an opportunity to put sympathetic Justices on the Court, while the other branch simply defers to the nomination of anyone whose views are not demonstrably extreme.

F. The Danger of Intellectual Homogeneity on the Court

Other things being equal, the Court benefits when it is composed of Justices with a range of views. The qualifier is important: we do not mean to suggest that the Court should have a member who believes that Brown v. Board of Education n93 should be overruled, or who considers welfare laws unconstitutional. n94 But with respect to a significant number of issues, the Court can perform its task better if there is a diversity of opinions.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n93. 347 U.S. 483 (1954).

n94. This is so for a combination of reasons: neither of these positions is intelectually respectable, in the sense that plausible arguments cannot be brought forward on its behalf; and each position lacks any significant support within the professional community.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This point is especially important today because Justice Marshall's retirement has deprived the Court of a distinctive voice, perhaps its last

liberal voice. Of course, categories like "liberal" are contestable. But it is clear that no one now on the Court fully shares Justice Marshall's orientation. n95 For several reasons, even those who disagree with Justice Marshall should consider his retirement an unfortunate development -- just as the loss of the last distinctively conservative voice would be an unfortunate development. These reasons also suggest why it is fundamentally incorrect to say that when the Court is predominantly of one view, it does not matter whether the ninth Justice holds another view.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n95. Justice Blackmun, the most liberal of the Court's Justices, is generally conservative on issues of criminal procedure. Justice Stevens is difficult to characterize as liberal or conservative. Nor do we deny that all of the Justices at some points depart from what might be predicted.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

First, because the Supreme Court's jurisdiction is discretionary, the Justices' ability to identify problems in the legal system is in some ways as important as their ability to decide fully briefed cases. Judges with distinctive views notice [*1511] legal problems that other judges do not see -- not through ignorance or malice, but because of differing priorities. Once an issue is brought to general attention, everyone might agree on what the outcome should be. But the issue might not have come to the Court's attention at all were it not for the distinctive concerns of one of the Justices. The certiorari process has often benefitted from 1 intellectual diversity of this kind, and it is important that it continue to do so.

Second, the Court's internal deliberations will suffer if the Court does not consist of Justices with differing views. If they are willing to listen, judges of one general outlook will learn a great deal from those with other basic orientations. Notably, one of the most significant theoretical contributions of the founding period consisted of the insistence, by the Federalists against the Anti-Federalists, that heterogeneity could be a creative and productive force. As Alexander Hamilton wrote in The Federalist, "the jarring of parties . . . often promote[s] deliberation." n96 One need not romanticize the real-world consequences of internal deliberation in order to suggest that differences in perspective often improve both the collective reasoning process and the outcomes.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n96. See THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Litigants alone cannot provide the necessary perspective. The quality of advocacy before the Court is uneven, and even the best advocate usually plays only a limited role in comparison with a member of the Court. Divergent views should be presented, and pressed, during internal deliberations, when the Court is formulating results and reasons. In this regard, litigants are inevitably inadequate.

Finally, throughout American history, dissenting opinions have helped Congress and the President -- and even future generations -- formulate their responses to the Court. n97 A Court that lacks a liberal voice -- or a conservative one -- would not carry out these educative tasks as well. It is hard for the American public to think about what the Court is doing if cases include no opinions presenting different sides.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n97. See, e.g., Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes & Brandeis, JJ., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

There remains the question of what counts as diversity, and of when a "diverse" view is so extreme as to be unacceptable. These questions are hard to answer in the abstract. On the one hand, the current Court is by no means monolithic in the sense that all of its members agree on everything important. In any nine-member body, there will be genuine disagreements. And, as we said, we do not think that the Court is insufficiently diverse because it lacks anyone who believes, for example, that Brown v. Board of Education n98 is wrong, or that the Constitution requires revolutionary socialism. On the other hand, the current Court now lacks any member fundamentally committed to the [*1512] views on constitutional method and constitutional results represented by judges like Hugo Black, William Brennan, William Douglas, Thurgood Marshall, and Earl Warren. These views cannot be characterized as marginal or as having nothing valuable to offer on their behalf. They have substantial support in the state and federal judiciaries, and from the public, Congress, professionals, and academics. Views of this sort provide a valuable perspective to the Court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n98. 347 U.S. 483 (1954).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For present purposes, however, we do not have to define the boundaries of the acceptable diversity of views. The need for a diversity of views on the Court strongly argues in support of the position we advance: namely, that the Senate should take an independent role in Supreme Court nominations. In a period of divided government, Senate independence will naturally produce a diversity of views on the Court. When the nation has made up its mind about an issue -- as the nation did about the New Deal in the late 1940's and as it has today about Brown -- individuals who are at odds with the national consensus will find no support in either the Senate or the Administration. n99 Where the nation has not made up its mind -- as ours has not, for example, about affirmative action, abortion, sexually explicit speech, or the separation of church and state -- an independent Senate role will ensure that the Court is not monolithic, and that its deliberations have the quality that will be absent if there is no serious encounter with divergent views.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n99. Sometimes, of course, a judge whose convictions diverge from the national consensus might well be desirable if the judge's own convictions are based on good reasons. Part of the point of judicial independence is to allow this phenomenon to occur. But it seems hard to design an appointments process that would systematically produce such judges.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

All of these considerations suggest that, under current circumstances, the Senate should undertake an independent role in evaluating nominees to the Supreme Court. n100 The Senate is entitled to insist that the next nominee be a "liberal" or a "moderate." It should not perceive itself as constrained by the Presidential election to confirm all minimally competent nominees who are not "out of the mainstream." In the words of the Constitution, the Senate is entitled to claim that it will not confirm any President's nominee unless there has been a process involving "advice" as well as "consent."

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n100. The Senate is a diverse body. Its members do not have a single view about the appropriate role of the Supreme Court. The same is true of any party that controls the Senate. For example, there are sharp disagreements among current Democrats about the appropriate role of the Court on such issues as affirmative action, abortion, and sex discrimination. But these disagreements do not argue against an independent role for the Senate. They suggest only that each Senator should feel free to examine and to vote on the basis of his or her convictions.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

III. A POLITICIZED PROCESS?

We suspect that the principal source of concern about an independent Senate role is not that it would be inconsistent with the Constitution. Rather, the concern -- and it is obviously an important one -- is that an independent Senate role would unduly politicize the process of choosing Justices, thus [*1513] exacerbating the serious difficulties of the current situation. In fact, however, there is good reason to think that the approach we suggest would result in a less politicized appointment process, and one less likely to have the other undesirable characteristics that have led to so much dissatisfaction. In addition, as we will discuss, there are ways to help limit any adverse effects of an independent Senate role.

A. The Process Is Already Politicized

As we have shown, many Presidents, including most of those who appointed the last eleven Justices, more or less overtly considered a candidate's likely voting patterns in choosing a nominee. Under the current understanding, the process is political in this sense, but only at one end: the President is free to choose as conservative a nominee as he thinks he can get away with, but in order to reject the nominee the Senate must do more than merely object to the nominee's political or legal orientation. In order to reject a nominee, the

Senate has to find some major deficiency in character or has to brand the nominee as "out of the mainstream."

There is no question that, if the Senate were to assume the independent approach we suggest, Senators would have to be prepared to make judgments about how nominees would be likely to vote if they became Justices. In this sense, our approach might add elements to the process that can be characterized as "political." But part of what has politicized the process is the approach of recent Presidents. n101 Requiring the Senate to be nonpolitical will not cure that. n102

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n101. Another part is the role of the Supreme Court in American government, but an analysis of that role would require a longer discussion than we can provide here.

n102. Our approach would indeed politicize the process in the sense that unlike a posture of deference, it would produce a kind of open and sustained public debate over nominees -- often prolonged, sometimes misleading and confusing, and in many respects "political." But this is a proper, if not always well designed, aspect of the system of checks and balances, and indeed of democracy itself.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A nonpolitical appointment process (leaving aside the question of what that might mean n103) might be far better than one in which both the President and the Senate unabashedly focus on a nominee's likely votes. But a nonpolitical process will not come about simply because the Senate abstains. And while there is much to be said for a process that is not politicized, there is little to be said for a process in which one side to a partisan debate is free to consider likely voting patterns, while the other is supposed to remain indifferent to them. This is especially the case in a prolonged period of divided government, when Presidents have criticized the Court on political grounds and have self-consciously tried to shift its course.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n103. See supra note 71.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1514] B. How an Independent Senate Role Might Ameliorate the Current Problems of the Appointment Process

More important, there is reason to think that our approach would actually make the process less political. We do not want to overstate this point, which is somewhat speculative. But ironically, a system in which only one side is free to be political might inject more politics into the appointment process than a system in which the two sides battle on equal terms.

If the Senate insists on its "advice" function, there will be a greater likelihood of bipartisan agreement before the nomination is made. A Senate willing to provide "advice" should allow its leadership to meet with the

President and other executive branch officials before a nomination is made. Influential Senators might well provide a list of preferred or acceptable candidates. They should certainly have an opportunity to review and comment on possible Presidential choices, with a power to "veto" before the fact those potential nominees of whom they most strongly disapprove. Such a system might well move toward a genuinely deliberative process in which Senators and executive branch officials talk together about future nominees. Such consultations might reduce or even eliminate many of the current problems.

Moreover, if the Senate is free to consider a nominee's views openly, the President will have a greater incentive to compromise on the choice of the nominee. The Senate will also have more reason to confirm such a compromise nominee without searching for out-of-context statements, trying to catch the nominee in a damaging admission, and the like. As matters stand now, the President has a strong incentive to choose a nominee who is very conservative, but who will be difficult to defeat. So long as the Senate is not openly concerned with the nominee's views in the same way as the President is, but confines itself to the nominee's "acceptability" -- that is, to whether the nominee has good character and is not an extremist -- the President has limited incentives to compromise on the choice. Instead, the ideal nominee is one who strongly agrees with the President, but who cannot be portrayed as unacceptable.

By the same token, so long as the Senate is not unabashedly free to consider likely voting patterns, it will have to find other ways to try to defeat nominees it actually opposes on these grounds. This is the dynamic that generates many of the practices that critics of the Senate deplore. We do not want to suggest that it is inappropriate for the Senate to take a careful look at a nominee's character and integrity. Matters of character can and should disqualify even a nominee of great legal distinction. But the confirmation process unquestionably has a tendency to exaggerate the importance of isolated statements from, for example, judicial opinions or academic articles written years earlier by the nominee. To some extent that exaggeration comes about because the Senate is, in effect, sublimating its legitimate concern with the nominee's judicial convictions.

[*1515] If the Senate were free to oppose a nominee explicitly because it disagreed with those convictions, n104 the President would have a stronger incentive to compromise by selecting a nominee whose views were more in keeping with those of the Senate. In the current climate, under the approach we advocate, it is not at all implausible that the President and the Senate might agree on a moderate nominee of genuine distinction. The President, knowing that he could not rely on the confirmation of an extreme conservative, might find such a nominee the second-best choice. The Senators, knowing they had done all they could to obtain a more moderate nominee, would have less incentive to attack the nominee's record in ways that might be unfair. Both sides, having checkmated each other on this dimension, might be more concerned with the nominee's qualities of intellect and vision.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n104. The point raises an important and controversial question: Should Senators be allowed to question the nominee about votes in specific cases? In brief, we advocate the following approach. Members of the Senate are fully entitled to ask such specific questions as they like. Nominees are entitled to refuse to answer -- if they do refuse, they may do so in part on the plausible

ground that no assurances should be given in advance, lest judicial independence be compromised. But for its part, the Senate is entitled to take into account the refusal to answer -- subject to the important qualifications we discuss below. See infra Part III.C. Senators may conclude that the absence of relevant assurances counts against confirmation.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In the long run, this interaction might be exceedingly healthy. Assume, for example, that the next nominee were a genuinely distinguished moderate, with unpredictable views on currently controversial issues. Assume also that the selection of such a nominee emerged through a process in which the Senate offered its advice and threatened to refuse its consent. If a Republican President nominated some such person, the dynamics of political compromise ought to leave him freer to fill the next seat with a genuinely distinguished conservative. Over the course of time, a President who, facing an independent Senate, was prepared to compromise on likely voting patterns for genuine distinction, might well, and certainly should, find a Senate prepared to do the same. Both distinction and diversity -- in the sense of maintaining a Court that reflected, in an appropriate way, the heterogeneity of public opinion -- might be furthered in this way.

It is naive to suppose that this would be the inevitable result of the independent Senate role we describe. But there is reason to believe that these desirable outcomes are more likely if the Senate takes an independent approach. The Supreme Court appointment process is already politicized; the institutions established by the executive branch for screening prospective nominees attest to how deep-seated that politicization is. Allowing the Senate to meet the Administration openly on grounds of a nominee's likely voting patterns holds out some hope of reducing the politicization. And even if it does not do that, it will nonetheless break the unjustified monopoly that the Administration now has on the consideration of political orientation in nominees. Above all, an active Senate role might increase the likelihood of a distinguished Supreme [*1516] Court, one whose members offer the appropriate qualities of character, excellence, and diversity of view.

C. The Problem of "Campaigning" for the Court

No one would welcome an appoitments process in which nominees to the Court made campaign promises -- commitments about how they will vote on particular issues -- to various Senators in the hope of gaining enough votes to be confirmed. Of course, once a nominee is confirmed, any such commitment is unenforceable. But a nominee who promised during a Senate hearing that she would not, for example, vote to overrule Roe v. Wade n105 would inevitably think twice about the public uproar that would result if she were persuaded by contrary arguments as a Justice and reneged on that promise.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n105. 410 U.S. 113 (1973).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

At first glance our proposal seems likely to encourage such campaign promises. On balance, however, it is unlikely that Senate independence would

make this problem worse than it already is. In fact, it might improve matters.

Whenever politics becomes strongly ideological, people who want to be on the Supreme Court have an incentive to campaign for the Court by reshaping their views. When a President pursues an ideological appointments strategy, the incentive is even greater. It is a safe prediction, for example, that the Bush Administration will not appoint anyone who has taken an unequivocal position in support of Roe. n106 Neither the President nor his advisers would have to ask a prospective nominee overt questions about such issues as abortion, affirmative action, or capital punishment. Since the President has the whole country to choose from, he can select someone who is reliable on these issues. People who want to be on the Court know that.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n106. The point is not partisan: the Roosevelt Administration would not have appointed anyone who stated that the New Deal was unconstitutional, and a Democratic President in the near future is unlikely to appoint anyone who unequivocally opposes Roe.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

If the Senate were to begin to act in the independent way we describe, what would change is not the degree of this kind of campaigning, but only the target. One could expect some people who see themselves as potential nominees to begin tailoring their public views to conform more closely to those of key Senators, instead of trying to attract the attention of the Administration as they do now. This would not be a desirable state of affairs, but it is no worse than what we have now. Moreover, campaigning of this kind, which often consists of writing editorials and making speeches, is not nearly as troublesome as explicit commitments made to a Senator in public hearings.

Perhaps surprisingly, our proposal should have the effect of reducing the likelihood of that kind of public commitment. Senators are aware of the unseemliness of a Supreme Court nominee having to campaign for office. Senators on the Judiciary Committee, for example, often try to learn about the nominee's [*1517] views while taking pains not to ask for commitments on specific issues. Moreover, Senators realize that public questioning of a well-coached nominee, by Senators who must be careful not to look too partisan or too bullying, is a particularly ineffective way to find out what a nominee really thinks.

What forces the Senators to ask uncomfortably specific questions is their sense that they would otherwise be excluded from any effective role in shaping the Court's orientation. If the Senate asserted itself more fully -- if it were a partner in choosing the nominee, instead of an after-the-fact check on acceptability -- it would not need to rely so heavily on the crude and ineffective tool of public questioning. As matters now stand, the President has an incentive to choose the most conservative nominee he can find and then devise the best way to slide that nominee through the Senate. The nominee then says what she must in the confirmation hearings. If the Senate were a full partner in the appointments process, the President would have a greater incentive to obtain the assent of key Senators before announcing a nominee. Those Senators, in deciding whether to assent, could examine the candidate's entire record -- just as the President can. Like the President, they would not need to seek

explicit commitments on specific issues at the time of the nomination. Indeed, they would be foolish to rely on such a "campaign promise" unless the nominee's entire record made it credible.

The current system creates a substantial incentive to make public commitments; unless a nominee can satisfy the Senate that she is acceptable, the Senate will reject the nomination even now. Thus, nominees routinely genuflect to Brown and, now, Griswold. There is good reason to believe that the changes in the Senate's approach that we propose will not make matters any worse, and may even make them better.

D. Improving the Process

As our previous arguments suggest, an independent Senate role might, perhaps paradoxically, diminish the importance of the confirmation hearings. Currently, the confirmation hearing is a climactic media spectacle that determines whether the President can slip his nominee (whom everyone knows was chosen in part for her likely voting patterns, despite the President's claims that merit was the exclusive basis) past the Senate (which is also concerned with the nominee's likely votes, notwithstanding the Senators' contention that they are concerned only with character, competence, and whether the nominee is in the "mainstream"). The fate of legislation is not decided in this manner. For the reasons outlined above, judicial appointments would not be decided in this way either, if the Senate approached them with the same independence it brings to the President's legislative initiatives.

In any event, many of the problems of the current appointments process, particularly those pointed out by supporters of the Administration, arise from [*1518] the central role of the confirmation hearing. Whether or not the Senate adopts a more independent view of its role (and perhaps especially if it does), a number of steps might be taken to reduce the significance of the hearing and to improve the process in general.

(1) The President should seek and take seriously the "advice" offered by the Senate. We have suggested several ways in which this might be done: the President might solicit a list of the Senate's preferred candidates; key Senators might be invited to review and comment on possible choices; or there might be ongoing discussions between Senators and the White House about possible nominees. If such consultations produced a mutually agreeable candidate, the hearings would be simpler and much less contentious. Even if the President could not agree with key Senators on a nominee, serious consultation would reduce the range of disagreement and, therefore, the adversarial nature of the hearings. The hearings would cease to be the only forum in which the Senate could make its voice heard.

(2) More generally, it is in the Senate's own interest to place less weight on the confirmation hearings. Both sides have pointed to serious problems in the current emphasis on those hearings. n107 Of particular importance is the threat to judicial independence posed by ongoing conversations between the Department of Justice and the White House on the one hand, and the nominee on the other. These conversations frequently involve matters likely to reach the Court. It is unfortunate if the nominee has been schooled in the views of the current Administration. Moreover, the hearings sometimes become mired in irrelevant or misleading factors, such as the nominee's telegenic qualities and how the various Senators "look." Televised competition between Senators and

the nominee, or among the Senators, is hardly in the national interest. Finally, because of their immediacy and drama, the hearings tend to assume disproportionate importance. They can dwarf the much more relevant information provided by the pre-nomination record. The pre-nomination record is a far more reliable indicator of the nominee's views. The Senate should rely principally on that record, rather than a nominee's testimony, in deciding whether to consent to the nomination. Such an emphasis would reduce many of the problems of the current system.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n107. See supra notes 1-4 and accompanying text. We note in particular the distortions of the prenomination record of Judge Robert Bork, catalogued in ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 323-36 (1988); the extensive preparation of nominees David Souter and Clarence Thomas before their hearings; the reliance on general appearance before the camera in the Bork, Souter, and Thomas hearings; the effects of television coverage on some Senators' behavior; and the uninformative generalities provided by several recent nominees in their statements to the Senators.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This is not to say that hearings do not have some virtues. At least in their ideal form, they have an important educative function. Confirmation hearings might help inform the public of the actual and potential role of the Supreme Court, allowing diverse views to be expressed on that subject. Too often the [*1519] nature of the Court, and of constitutional law generally, is unnecessarily obscured; hearings can serve to enlighten. But the current system offers only minor advances in public education, and it does so while introducing a range of distortions into the process. Moreover, it appears that the hearings can be truly educative only on those occasions when the system is, in a sense, out of equilibrium. This occurs, for example, when the questioners unexpectedly change their tactics and the Administration and nominee are caught unprepared. Once the executive adjusts, the hearings become stylized and their educative value is reduced. Reducing the centrality of the hearings would significantly advance the goal of a healthy confirmation process. n108

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n108. A reduced emphasis on the hearings might, however, also work against an independent senatorial role, at least to the extent that such hearings mobilize public opposition to a nominee. We hope that such a role does not depend on such mobilization, produced as it sometimes is by arbitrary or irrelevant factors.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

(3) The Senate should place the burden of proof -- with respect to character, excellence, and point of view -- on the nominee. No one has a right to sit on the Supreme Court. The country need not accept nominees simply because they might ultimately prove distinguished or open-minded. A "hope" to this effect is insufficient. n109 In exercising its consent power, the Senate is entitled to reject nominees simply because they have not established that they have the requisite qualities, even if there is considerable uncertainty on that point.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n109. It follows that the burden of proof required in a criminal trial is inappropriate in the confirmation hearings. A heavy burden of proof is correctly placed on governmental efforts to incarcerate someone, or to convict him of a criminal offense; in view of the enormous harm of a mistake -- the conviction of an innocent person -- the state must bear an extraordinary burden. In a confirmation hearing, the possibility of harm argues in precisely the opposite direction. Someone wrongly denied a seat on the Court may be embarrassed or worse, but is hardly placed in the position of a convicted criminal. Someone wrongly placed on the Court is in a unique position to commit social harm. For this reason we think much of the "heavy burden of proof" rhetoric in the confirmation hearings involving Justice Thomas was misconceived -- though we do not confront the many complexities of those hearings, unfortunate by any standard, in this space.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This understanding of the burden of proof would remove some of the difficulties introduced by greater reliance on the pre-nomination record. For example, such reliance creates an incentive for the President to nominate people without extensive records, simply because they have not said anything controversial. n110 The Senate need not confirm someone of this sort. Indeed, it should presume that a candidate of this kind will not meet the burden of proof.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n110. As argued at the time by Bork's supporters, an unfortunate consequence of the Bork hearings has been precisely this.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

(4) The Senate might rely more formally on lawyers familiar with the workings and practices of the Court. The Senators have an extraordinary range of duties. Although many Senators are, by training and temperament, well equipped to handle constitutional issues, it is unreasonable to expect members of the Judiciary Committee to be specialists in the intricacies of legal doctrine. Perhaps some of the questioning should be done directly by outside counsel. Perhaps there should be sharp time limits on senatorial questioning. In any case, the difficulties inherent in the hearing process, especially in an era dominated [*1520] by television coverage, argue strongly against the current emphasis on a process that has become a public spectacle.

These are simply a few suggestions intended to counteract some of the difficulties likely to accompany an independent role for the Senate. Other solutions are surely possible as well. The principal point is that the confirmation hearing ought not to be the centerpiece of the decision whether or not to consent to a judicial appointment. There are far more reliable and desirable means from which the Senate can draw information about the candidate.

IV. CONCLUSION

The Constitution contemplates an important role for the Senate in the confirmation process. It provides that there will be senatorial "advice"

before the fact. It ensures that no nominee may serve without senatorial "consent." There is especially strong structural support for such a role in connection with appointments to the branch of government that resolves disputes and allocates power between the other two branches.

We are in the midst of an extraordinary period -- one in which Republican Presidents have made eleven consecutive appointments, usually with ideological motivations, even though the Congress was solidly controlled by the Democratic Party for virtually this entire period. In this context, it is unhealthy for the Senate to maintain a posture of deference. The current system, unprecedented in the nation's history, creates serious risks from the standpoint of checks and balances. The Senate should now assume a self-consciously independent role. It should insist on its constitutional prerogatives.

APPENDIX

TABLE 1. Judicial Appointments by President

YEAR	PRESIDENT	PRESIDENT'S PARTY a	JUSTICE(S) APPOINTED	YEAR CONFIRMED	SENATE'S PARTY a
1789	Washington(10)	F	John Jay CJ	1789	Ad
			John Rutledge	1789	Ad
			William Cushing	1789	Ad
			James Wilson	1789	Ad
			John Blair	1789	Ad
			James Iredell	1790	Ad
			Thomas Johnson	1791	F
			William Paterson	1793	F
			Samuel Chase	1796	F
			Oliver Ellsworth CJ	1796	F
1797	J. Adams (3)	F	Bushrod Washington	1798	F
			Alfred Moore	1799	F
			John Marshall CJ	1801	F
1801	Jefferson (3)	DR	William Johnson	1804	DR
			H. Brockholst Livingston	1806	DR
			Thomas Todd	1807	DR
1809	Madison (2)	DR	Joseph Story	1811	DR
			Gabriel Duvall	1811	DR
1817	Monroe (1)	DR	Smith Thompson	1823	DR
1825	J.Q. Adams (1)	C	Robert Trimble	1826	Ad
1829	Jackson (6)	D	John McLean	1829	D
			Henry Baldwin	1830	D
			James M. Wayne	1835	D
			Roger B. Taney CJ	1836	D
			Philip B. Barbour	1836	D
			John Catron	1837	D
1837	Van Buren (2)	D	John McKinley	1837	D
			Peter V. Daniel	1841	D
1841	W. Harrison (0)	W			
1841	Tyler (1)	W	Samuel Nelson	1845	W
1845	Polk (2)	D	Levi Woodbury	1845	D
			Robert C. Grier	1846	D
1849	Taylor (0)	W			
1850	Fillmore (1)	W	Benjamin R. Curtis	1851	D
1853	Pierce (1)	D	John A. Campbell	1853	D
1857	Buchanan (1)	D	Nathan Clifford	1858	D
1861	Lincoln (5)	R	Noah H. Swayne	1862	R
			Samuel F. Miller	1862	R

		Davis Davis	1862	R	
		Stephen J. Field	1863	R	
		Salmon P. Chase CJ	1864	R	
1865	A. Johnson (0)	R			
1869	Grant (4)	R	William Strong	1870	R	
			Joseph P. Bradley	1870	R	
			Ward Hunt	1872	R	
			Morrison R. Waite CJ	1874	R	
1877	Hayes (2)	R	John M. Harlan	1877	R	
			William B. Woods	1880	D	
1881	Garfield (1)	R	Stanley Matthews	1881	R	b
1881	Arthur (2)	R	Horace Gray	1881	R	
			Samuel Blatchford	1882	R	
1885	Cleveland (2)	D	Lucius Q.C. Lamar	1888	R	
			Melville W. Fuller CJ	1888	R	
1889	B. Harrison (4)	R	David J. Brewer	1889	R	
			Henry B. Brown	1890	R	
			George Shiras, Jr.	1892	R	
			Howell E. Jackson	1893	R	
1893	Cleveland (2)	D	Edward D. White	1894	D	
			Rufus W. Peckham	1895	R	
1897	McKinley (1)	R	Joseph McKenna	1898	R	
1901	T. Roosevelt (3)	R	Oliver W. Holmes, Jr.	1902	R	
			William R. Day	1903	R	
			William H. Moody	1906	R	
1909	Taft (6)	R	Horace H. Lurton	1909	R	
			Charles E. Hughes	1910	R	
			Edward D. White CJ c	1910	R	
			Willis Van Devanter	1910	R	
			Joseph R. Lamar	1910	R	
			Mahlon Pitney	1912	R	
1913	Wilson (3)	D	James C. McReynolds	1914	D	
			Louis D. Brandeis	1916	D	
			John H. Clarke	1916	D	
1921	Harding (4)	R	William H. Taft CJ	1921	R	d
			George Sutherland	1922	R	
			Pierce Butler	1922	R	
			Edward T. Sanford	1923	R	
1923	Coolidge (1)	R	Harlan F. Stone	1925	R	
1929	Hoover (3)	R	Charles E. Hughes CJ	1930	R	
			Owen J. Roberts	1930	R	
			Benjamin N. Cardozo	1932	R	
1933	Roosevelt (9)	D	Hugo L. Black	1937	D	
			Stanley F. Reed	1938	D	
			Felix Frankfurter	1939	D	
			William O. Douglas	1939	D	
			Frank Murphy	1940	D	
			Harlan F. Stone CJ e	1941	D	
			James F. Byrnes	1941	D	
			Robert H. Jackson	1941	D	
			Wiley B. Rutledge	1943	D	
1945	Truman (4)	D	Harold H. Burton	1945	D	
			Fred M. Vinson CJ	1946	D	
			Tom C. Clark	1949	D	
			Sherman Minton	1949	D	
1953	Eisenhower (5)	R	Earl Warren CJ	1953	R	f

		John M. Harlan	1955	D g
		William J. Brennan, Jr.	1957	D
		Charles E. Whittaker	1957	D h
		Potter Stewart	1959	D
1961 Kennedy (2)	D	Byron R. White	1962	D
		Arthur J. Goldberg	1962	D
1963 Johnson (2)	D	Abe Fortas	1965	D
		Thurgood Marshall	1967	D
1969 Nixon (4)	R	Warren E. Burger CJ	1969	D
		Harry A. Blackmun	1970	D
		Lewis F. Powell	1971	D
		William H. Rehnquist	1971	D
1974 Ford (1)	R	John Paul Stevens	1975	D
1977 Carter (0)	D			
1981 Reagan (4)	R	Sandra Day O'Connor	1981	R
		William H. Rehnquist CJ e	1986	R
		Antonin Scalia	1986	R
		Anthony M. Kennedy	1987	D
1989 Bush (2)	R	David H. Souter	1990	D
		Clarence Thomas	1991	D

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

a Letter symbols for political parties: Ad - Administration; C - Coalition; D - Democratic; DR - Democratic-Republican; F - Federalist; R - Republican; W - Whig.

b The Senate was evenly divided in the 47th Congress, with Vice-President Chester Arthur giving the Republican Party control.

c Denotes a Chief Justice who was elevated from the position of Associate Justice.

d The Republican Party held the Senate by a two-vote margin in the 66th Congress.

e Denotes a Chief Justice who was elevated from the position of Associate Justice.

f The Republican Party held the Senate in the 83d Congress by only one vote, with one Senator affiliating with neither the Democratic nor the Republican Party.

g In the 84th Congress, the Democrats held the Senate by only one vote, with one Senator affiliating with neither the Republican nor the Democratic Party.

h The Democrats' majority in the Senate in the 85th Congress was only two votes.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

TABLE 2. Appointments and Senate Majority Party

YEAR	PRESIDENT(S)	PARTY	NUMBER OF JUSTICES APPOINTED i	SENATE MAJORITY PARTY D	R
1921-33	Harding/Coolidge/Hoover	R	8	0	8

1953-61	Eisenhower	R	5	4	1
1969-92	Nixon/Ford/Reagan/Bush	R	11	8	3
1933-53	Roosevelt/Truman	D	13	13	0
1961-69	Kennedy/Johnson	D	4	4	0
1979-81	Carter	D	0		

SOURCES: CONGRESS A TO Z: CQ'S READY REFERENCE ENCYCLOPEDIA 496-98 (Congressional Quarterly Inc. 1988); HAROLD W. STANLEY & RICHARD E. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 292-97 (1992); ELDER WITT, GUIDE TO THE U.S. SUPREME COURT 995-98 (1990).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

i This includes three elevations from Associate Justice to Chief Justice, two in the Harding/Coolidge/Hoover era, and one in the Nixon/Ford/Reagan/Bush era.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

```
****----------------------------------------------------------------------****

*    4914 PAGES            219205 LINES            JOB  30882   104PH6       *
*  12:20 P.M. STARTED     1:54 P.M. ENDED              03/29/99               *
****----------------------------------------------------------------------****
****----------------------------------------------------------------------****
*                         EEEEE      N   N      DDDD                         *
*                         E          N   N      D   D                        *
*                         E          NN  N      D   D                        *
*                         EEE        N N N      D   D                        *
*                         E          N  NN      D   D                        *
*                         E          N   N      D   D                        *
*                         EEEEE      N   N      DDDD                         *

****----------------------------------------------------------------------****

****----------------------------------------------------------------------****
```

SEND TO: THOMPSON, CARRIE
WHO - GEN. COUNSEL
RM 308
OLD EXECUTIVE OFFICE BLDG
WASHINGTON, DISTRICT OF COLUMBIA 20502